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No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANTHONY M. FRANK, IN HIS CAPACITY AS POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE, PETITIONER

v.

DARLENE SHIDAKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a plaintiff can state a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on an alleged disparate impact resulting from a subjective promotion practice or procedure.

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ANTHONY M. FRANK, IN HIS CAPACITY AS
POSTMASTER GENERAL OF THE UNITED STATES
POSTAL SERVICE, PETITIONER

v.

DARLENE SHIDAKER

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

The Solicitor General, on behalf of Anthony M. Frank, in his capacity as Postmaster General of the United States Postal Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 833 F.2d 627. An earlier opinion of the court of appeals (App., *infra*, 16a-29a) is reported at 782 F.2d 746. The opinion of the district court (App., *infra*, 30a-62a) is reported at 593 F. Supp. 823.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1987. A petition for rehearing was denied

on December 14, 1987 (App., *infra*, 13a-14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

42 U.S.C. 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-16(a) provides:

> All personnel actions affecting employees or applicants for employment * * * in the United States Postal Service * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

1. Respondent, Darlene Shidaker, served as acting postmaster and then as postmaster of a small post office in Kenilworth, Illinois from 1962 through 1982. During this time, she was in pay scale level-18. In 1977, the Postal Service advertised vacancies for three pay scale level-22

postmaster positions in other, larger post offices in Illinois. Respondent applied for all three positions. App., *infra*, 31a-34a.

Pursuant to its regulations, the Postal Service convened a Screening Board to assess all applicants for the three vacancies. The Screening Board reviewed each applicant's work experience, educational background, performance appraisals, capacity for growth, and potential in management problem solving, employee development and relations, budget operations, work supervision, and public and community relations. The Screening Board then eliminated applicants lacking minimal qualifications, ranked the qualified candidates by tallying point scores assigned them by each of the Board members, and forwarded the names of the seven highest ranked applicants for each vacancy to a regional selection manager. That manager added the candidates on the Screening Board's list to a list of Postal Service employees who, by regulation, had an absolute right to be considered for the vacancies. From the combined list, the manager recommended five to seven candidates for each vacancy to a Regional Management Selection Board. The Regional Management Selection Board interviewed and evaluated each of these candidates and then recommended a single person for each vacancy to the Postmaster General. The Postmaster General made the final appointments. App., *infra*, 34a-39a.

Respondent was the only female to apply for each of the three postmaster vacancies. She competed with 31 other applicants for two of those vacancies, and with 27 other applicants for the third vacancy. The Screening Board found several instances of prior mismanagement in respondent's personal history[1] and determined, based on

[1] Two members of the Screening Board had "first-hand knowledge of the conditions of the post office run by [respondent]. [Mr.] Wright,

her composite personnel profile, that she was not among the top seven applicants for any of the available jobs.[2] Accordingly, respondent was not further considered by the Postal Service for the vacant positions and did not receive a promotion. But respondent believed that the Postal Service did not promote her because of her gender and, accordingly, after exhausting her administrative remedies, filed this Title VII action in the United States District Court for the Northern District of Illinois. App., *infra*, 34a-39a.

2. The district court conducted a full trial concerning respondent's claims (App., *infra*, 31a). Respondent produced evidence showing that, at the time of her failed promotion, the Postal Service had a policy of promoting from within and that an arguably significant disparity existed between the percentage of females occupying low-level and high-level positions in the Postal Service's work force (*id.* at 34a, 39a-40a).[3] The Postal Service responded

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as a postal inspector, had investigated an instance of poor security in connection with the issuance of money orders and he described [respondent's] management as sloppy. [Mr.] Wright • • • told the Screening Board that Christmas mail deliveries were two or three days late. [Mr.] Besteda also told the Screening Board that the Kenilworth post office was not well managed." App., *infra*, 36a.

[2] The Screening Board ranked respondent thirteenth out of the 16 applicants that it deemed minimally qualified for the Glenview, Illinois postmaster position (App., *infra*, 36a). It ranked respondent sixteenth out of the 17 applicants that it deemed minimally qualified for the Palatine, Illinois postmaster position (*id.* at 36a-37a). And the Screening Board ranked respondent fifteenth out of the 17 applicants that it deemed minimally qualified for the Franklin Park, Illinois postmaster position (*id.* at 37a).

[3] Specifically, respondent introduced evidence showing that (App., *infra*, 51a-52a):

> In November, 1974, women held 20.8% of the positions in the Postal Service workforce. The percentage had moved to 23.5%

with evidence explaining its promotion procedures, the special skills and training that postmasters at different levels must have, the fact that postmasters (including respondent) have in the past been promoted both from within and without the Postal Service workforce, and the reasons that the Postal Service had for not promoting respondent to any of the three vacancies (*id.* at 34a-39a, 43a-48a). The Postal Service also argued that, since she had not identified a facially neutral selection device which had injured her, respondent had not raised a legally cognizable disparate impact claim (Tr. 24-26, 427-430, 447-449). Respondent countered that the Postal Service's "whole promotion procedure" produced the "disparate impact" (Tr. 454). After hearing all of the evidence, as well as the parties' arguments concerning that evidence, the district court concluded that the Postal Service had not discriminated against respondent in its promotion decisions – under either a "disparate treatment" or a "disparate impact" theory (App., *infra*, 48a-58a).[4]

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by November 1980. Nationally, women held 11.5% of the positions at PES-15 and above in January, 1980.

In 1978, the year of [respondent's] failed promotion, women occupied 23 of the 108 postmaster positions in the North Suburban MSC, or 21.2% of the total postmaster positions. However, none of the women postmasters were rated higher than PES-20 and 15 of them were at level PES-15 or lower. Additionally in 1977-1978 a total of 2,008 women were employed in the North Suburban MSC, 29.4% of the entire Postal Service workforce in the area. Despite that overall percentage, only four women or 5% [of those filling positions of PES-19 or higher] were rated in positions of PES-19 or higher. * * *

[4] The district court also rejected respondent's claim that the Postal Service had retaliated against her – by reducing her in grade – for initially raising her Title VII claim in 1978 (App., *infra*, 58a-62a). The court held that the Postal Service had demoted her for "misfeasance and malfeasance and not in retaliation for * * * her civil rights

With regard to the "disparate treatment" issue, the court found that "[respondent] has not proved, by a preponderance of the evidence, that the Postal Service failed to promote her because she was a woman" (App., *infra*, 58a). The court said that the Postal Service had a "legitimate, nondiscriminatory business reason" for not promoting respondent—*i.e.*, that the three candidates actually promoted were either more qualified or had higher composite Screening Board ratings than did respondent (*id.* at 53a, 56a). Finally, it found that "the procedure used by the Postal Service to initially select candidates for promotion consideration was permissible and without overt indicia of discrimination" (*id.* at 57a).

With regard to the "disparate impact" issue, the court held that respondent had raised a legally cognizable discriminatory impact claim even though "the system attacked includes both objective and subjective parts" (App., *infra*, 50a). But the court also concluded that, where "management jobs which demand skills and training possessed by relatively few individuals" are in issue (*id.* at 52a), statistics showing a disparity—even a gross disparity—between the percentage of females in the lower and higher work force levels are not by themselves sufficient to establish discriminatory disparate impact (*ibid.*). Since respondent had not introduced evidence concerning the dates on which females had entered the Postal Service's work force, the number of females who had actually applied for promotions, the distribution of females by pay scale levels in the workforce, or the number of females who qualified for promotion, the court found her evidence of disparate impact to be inadequate and granted judg-

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claim" (*id.* at 61a-62a). The court of appeals affirmed (*id.* at 2a, 23a-29a). The retaliation claim has no bearing on the issues raised by this petition and, accordingly, we discuss it no further.

ment to the Postal Service on the disparate impact claim as well (*ibid.*).

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings (App., *infra*, 16a-29a). The court agreed with the district court that respondent had not supported her allegations of disparate treatment (*id.* at 29a). But, while it too allowed respondent to proceed on a disparate impact theory,[5] the court disagreed with the district court's conclusion that respondent had failed to support her disparate impact claim. "Once [respondent] proved that the Postal Service promotes from within and introduced statistical evidence showing that there is a gross disparity between the percentage of women occupying lower level positions and upper level positions, she made a sufficient *prima facie* showing of discriminatory impact" (*id.* at 20a (footnote omitted)). The court therefore remanded the case to the district court in order that the Postal Service might bring forward evidence "that few women occupying lower level positions have applied for upper level positions or are qualified for upper level positions, or to bring forward evidence of the job-relatedness of its promotion standards" (*id.* at 22a).

4. The Solicitor General then petitioned for a writ of certiorari to the court of appeals' judgment (No. 86-468). The petition asked this Court to resolve (1) whether a

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[5] The court of appeals did not explicitly address in its opinion whether respondent's challenge to the Postal Service's subjective, multi-component promotion procedure presents a legally cognizable disparate impact claim. But the Postal Service fully briefed the issue as an alternative ground for affirming the district court's judgment. See Br. for the Defendant-Appellee 14-17 (filed May 3, 1985); see also Appellee's Pet. for Reh'g and Suggestion for Reh'g En Banc 8-13 (filed Mar. 13, 1986). Thus, the Postal Service clearly raised the issue to the court below and, in deciding that respondent had in fact established a prima facie case of disparate impact, the court necessarily decided it.

plaintiff can state a cause of action under Title VII based on an alleged disparate impact resulting from a subjective promotion practice or procedure and (2) whether, assuming disparate impact theory is permissible, a plaintiff establishes that a promotion procedure is prima facie unlawful merely by showing that the employer promotes from within in filling upper level positions requiring managerial ability and other special skills and that a gross disparity exists between the percentage of females occupying those upper level positions and low-level positions in the employer's work force. By order dated April 6, 1987 (App., *infra*, 15a), the Court granted the petition, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987).

5. On remand, the court of appeals reinstated its prior judgment in all pertinent respects (App., *infra*, 1a-12a). It again failed explicitly to address the Postal Service's claim that disparate impact theory does not apply in challenges to subjective promotion practices and procedures. Rather, it implicitly rejected that claim and defined the sole issue on remand to be "whether [respondent's] statistical evidence was sufficent to establish a *prima facie* case of disparate impact under Title VII of the Civil Rights Act of 1964" (*id.* at 2a (footnote omitted)). It then concluded that "[respondent's] statistical evidence was sufficient to establish a prima facie case of disparate impact under Title VII" (*ibid.*).

ARGUMENT

This case presents essentially the same question as is presented in *Watson* v. *Fort Worth Bank & Trust Co.*, No. 86-6139 (argued Jan. 20, 1988). In *Watson*, the Court will decide whether subjective promotion processes may be

challenged under the disparate impact analysis approved by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).[6] In this case, the court of appeals has, notwithstanding the Postal Service's arguments to the contrary, allowed respondent to proceed against the Postal Service's subjective promotion process on a disparate impact theory. Since the Court will soon decide whether that action is permissible, we request that this petition be held pending the decision in *Watson* and then disposed of as is appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Watson* v. *Fort Worth Bank & Trust Co.*, No. 86-6139, and then disposed of as is appropriate in light of that decision.

Respectfully submitted.

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MARCH 1988

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[6] In its amicus curiae brief in *Watson*, the United States has argued that disparate impact theory should not apply in challenges to subjective decisionmaking processes. We are furnishing counsel for respondent with a copy of our brief in *Watson*.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-2791

DARLENE SHIDAKER, PLAINTIFF-APPELLANT

v.

PRESTON R. TISCH,[1] IN HIS CAPACITY AS POSTMASTER GENERAL (UNITED STATES POSTAL SERVICE), DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 82 C 5635 – WILLIAM T. HART, *Judge*

Argued September 13, 1985 – Decided January 29, 1986
On Remand from the United States Supreme Court
Decided November 16, 1987

Before: BAUER, *Chief Judge*, CUMMINGS and FLAUM, *Circuit Judges.*

BAUER, *Chief Judge.* This is an appeal by Darlene Shidaker from an adverse judgment entered below in favor of Preston R. Tisch in his capacity as Postmaster General of the United States Postal Service. Shidaker, a postal employee, claims that the Postal Service denied her

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[1] Mr. Tisch has replaced Mr. Carlin as Postmaster General. We therefore substitute Mr. Tisch as the defendant-appellee pursuant to Rule 25(d)(1) of the FEDERAL RULES OF CIVIL PROCEDURE.

a promotion because she is a woman and then demoted her for challenging that promotion denial as discriminatory. In our original opinion, this panel reversed and remanded for further consideration the district court's finding that Shidaker's promotion denial was not discriminatory and we affirmed the district court's finding that Shidaker's demotion was not retaliatory. *Shidaker v. Carlin*, 782 F.2d 746 (7th Cir. 1985).

On April 6, 1987, the United States Supreme Court granted the Postal Service's petition for certiorari, vacated this court's judgment, and remanded the case for further consideration in light of *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. ____, 107 S.Ct. 1442 (1987). The only issue before this Court on remand is whether Shidaker's statistical evidence was sufficient to establish a *prima facie* case of disparate impact under Title VII of the Civil Rights Act of 1964.[2] After reviewing the Supreme Court's decision in *Johnson*, we follow our original opinion and hold that Shidaker's statistical evidence was sufficient to establish a *prima facie* case of disparate impact under Title VII.

I.

We will briefly summarize the relevant facts discussed in our previous decision. Shidaker was Acting Postmaster and then Postmaster of Kenilworth, Illinois from 1962 through 1982. In this position she was in pay scale category PES-18. In 1977, Shidaker applied for vacant PES-22 postmaster positions at offices in Glenview, Palatine, and Franklin Park, Illinois. The Postal Service follows a policy of promoting from within and ninety-two

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[2] We reinstate our earlier decision affirming the district court in all other respects.

postal employees applied for the three vacant postmaster positions. Shidaker, the only female applicant, was not promoted to any of the positions.

In 1978, Shidaker filed an Equal Employment Opportunity ("EEO") complaint alleging that she was denied promotion to the PES-22 postmaster positions on the basis of her sex. In 1980, an Equal Employment Opportunity Commission Complaint Examiner held a hearing on Shidaker's complaint. In September 1982, the Complaint Examiner issued a decision on the complaint finding that Shidaker was denied promotion on the basis of sex. In October 1982, the Postal Service's Regional Director for Employment and Labor Relations Central Region notified Shidaker that the Postal Service was rejecting the Examiner's decision.

Shidaker sued the Postal Service in the United States District Court for the Northern District of Illinois, Eastern Division. Count I of her complaint alleged discriminatory failure to promote under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 and 39 U.S.C. § 409. We consider this allegation on remand.

The district court found that Shidaker failed to establish a *prima facie* case of disparate impact. The court found that Shidaker did establish a *prima facie* showing of disparate treatment, but also found that the Postal Service demonstrated legitimate, nondiscriminatory, nonpretextual, reasons for not promoting Shidaker.

We agree with Shidaker that she made an adequate *prima facie* showing of disparate impact. We therefore reverse the district court and remand Shidaker's disparate impact claim for further consideration.

II.

A.

The Supreme Court's decision in *Johnson* arises out of facts and circumstances that differ from those involved in this case. *Johnson* was a reverse discrimination suit brought under Title VII by a white male who alleged that the promotion of an allegedly less qualified female pursuant to a voluntary affirmative action plan violated his rights under Title VII. In concluding that the affirmative action plan did not violate Title VII, the Supreme Court considered the degree to which statistical proof reflecting an underrepresentation of women in traditionally segregated jobs could justify an affirmative action plan. 107 S.Ct. at 1452. Specifically, the Supreme Court held that an employer need only show a "manifest imbalance' in order to adopt a voluntary affirmative action plan under Title VII. *Id.* The Court noted further that the "imbalance need not be such that it would support a *prima facie* case against the employer [under the Title VII]." *Id.*[3]

The *Johnson* Court reiterated its earlier holding in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), that in order to make out a *prima facie* case of discrimination under a disparate treatment "pattern and practice" theory, a plaintiff must compare the percentage of minorities or women in the employer's work force "with

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[3]Although the Court did not expressly say so, when it discussed the *prima facie* standard under Title VII, it was referring to the disparate treatment theory, not disparate impact theory because the plaintiff in *Johnson* was alleging intentional discrimination based on a sex-conscious affirmative action plan. 107 S.Ct. at 1449 (applying the disparate treatment order and allocation of proof requirements). *See also* 107 S.Ct. at 1463 (O'Connor, J., concurring in the judgment) (discussing the *prima facie* standard in disparate treatment "pattern and practice" cases).

those in the labor force who possess the relevant qualifications." *Johnson*, 107 S.Ct. at 1452; *see also Johnson*, 107 S.Ct. at 1452-53 n.10; *Steelworkers v. Weber*, 443 U.S. 193, 198-99 (1979).[4]

B.

Johnson's relevance to the instant case is limited. *Johnson* is not a disparate impact case and it does not break new ground in this area of Title VII jurisprudence. Rather, *Johnson* briefly reaffirms the Supreme Court's earlier holdings regarding the sufficiency and probative value of statistical proof under Title VII. The *Johnson* Court's discussion of *Hazelwood*, however, is pertinent. Although *Hazelwood* was a disparate treatment pattern and practice case, its holding regarding the sufficiency of statistical proof has been applied in large part to the disparate impact area of Title VII.

To make a *prima facie* showing of discriminatory impact, Shidaker need only present evidence that the Postal Service's promotional practices, although facially neutral, selects promotees "in a significantly discriminatory pattern." *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). This evidence may be, and most often is, statistical in nature. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 584 (1979); *Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 867 (7th Cir. 1985). The statistical showing required to establish a *prima facie* case under the disparate impact theory may be less than the "gross disparity" required

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[4] In order to establish a "manifest imbalance" sufficient to justify an affirmative action plan, the same comparison must be made, although the level of disparity may be less. *Johnson*, 107 S. Ct. at 1452 n.10.

under "pattern and practice" disparate treatment cases. See *Hazelwood*, 433 U.S. at 307-08; *Teamsters*, 431 U.S. at 340 n.20 (holding that a "gross disparity" may establish a *prima facie* case in disparate treatment pattern and practice cases). As this Court held in *Clark v. Chrysler Corp.*, 673 F.2d 921, 926-27 (7th Cir. 1982), "[i]n the use of statistical evidence to demonstrate the disparate impact of an allegedly discriminatory practice, the statistical disparity demonstrated must be 'significant' or 'substantial.' " (citations omitted). *See also Griffin v. Board of Regents of Regency University*, 795 F.2d 1281, 1287 (7th Cir. 1986) (in disparate impact cases, "plaintiff must show that the policies and practices at issue have a substantially disproportionate impact . . . ."); *Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1054 (5th Cir. 1984) (disparate treatment requires showing of "gross disparity" although a "marked disproportion" sufficies [*sic*] to prove disparate impact).[5]

In both the disparate treatment and impact contexts, *Hazelwood* teaches that statistical evidence is probative when it compares the percentage of minorities or women in the employer's work force with the percentage of minorities and women in the relevant labor market. 433 U.S. at 307-08. In instances where the job requires special training or skills, the relevant labor market consists of those persons who possess the relevant qualifications. *Johnson*, 107 S.Ct. at 1452; *Hazelwood*, 433 U.S. at 308 n.13; *Regner v. City of Chicago*, 789 F.2d 534, 537-38 (7th Cir. 1986). Where a company is shown to promote from within, the relevant labor pool of qualified applicants for

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[5] We need not define the precise extent to which the *prima facie* standard differs in disparate treatment and disparate impact cases because, as we noted *supra* at 8, the district court found a gross disparity presented by Shidaker's statistics.

upper level positions may be the group of employees in the company from which promotees will be drawn. See *Hazelwood*, 433 U.S. at 308 n.13; *Paxton v. Union National Bank*, 688 F.2d 552, 564 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Fisher v. Procter & Gamble Mfg.*, 613 F.2d 527, 544 (5th Cir. 1980), *cert. denied*, 449 U.S. 115 (1981). Thus, where the plaintiff can show that the employer promotes from within, evidence of a gross disparity between the percentages of minorities in upper and lower level positions is sufficient to establish a *prima facie* case of discrimination under both disparate treatment or disparate impact theories. *Regner*, 789 F.2d at 538 (disparate impact promotion case); *Segar* v. *Smith*, 738 F.2d 1249, 1276-77 (D.C. Cir. 1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115, 105 S.Ct. 2357 (1985), (disparate impact promotion case); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 865-67 (9th Cir. 1982) (disparate treatment promotion case); *Fisher*, 613 F.2d at 544 (5th Cir. 1980) (disparate impact promotion case); *see also Mozee v. Jeffboat*, 746 F.2d 365, 372 (7th Cir. 1984); *Paxton*, 688 F.2d at 556-57 n.3.

C.

Both Shidaker and the Postal Service agree that under *Hazelwood* and *Johnson*, Shidaker must compare the percentage of women in high level postmaster positions with the percentage of women in the qualified labor pool. They differ, however, in the application of this standard to this case. Shidaker argues that the statistics offered to the district court reflect a gross disparity between the number of women occupying low level postmaster positions as compared to the small number of women serving in the higher level postmaster grades. Shidaker argues further that because the postal service promotes from within, the relevant qualified labor group for comparison pur-

poses is the lower level postmasters from which the promotees to the high level position are drawn. The Postal Service counters, and the district court held, *Shidaker v. Bolger*, 593 F.Supp. 823, 835 (N.D. Ill. E.D. 1984), that these statistics alone are insufficient to establish a *prima facie* case. Rather, the district court required statistical evidence relating to applicant flow (*e.g.*, how many women have applied for certain positions in the past, how many women were eligible for past vacancies).

The district court incorrectly found that Shidaker failed to make a *prima facie* showing of disparate impact. Once Shidaker proved that the Postal Service promotes from within and introduced statistical evidence showing a gross disparity between the percentage of women in lower level postmaster positions and those in upper level postmaster positions, she made a sufficient *prima facie* showing of disparate impact. She need not, as the district court apparently thought, make a further statistical showing regarding applicant flow.

D.

The district court found that the Postal Service had a policy of promoting from within.[6] *Shidaker*, 593 F.Supp. at 827. Although the district court did not find expressly that any skills were required for these higher level postmaster positions, it did find that a Screening Board first evaluated applicants to eliminate those who did not possess the minimal qualifications. *Id.* at 828. Shidaker was found qualified for all three jobs by the Screening Board. The only factor which seemed to distinguish the rankings of those deemed qualified was experience as

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[6] All three men selected for the positions to which Shidaker applied were postmasters. One was a PES-18, the same level as Shidaker. The other two were promoted from a higher grade.

postmaster, not any particular skills.[7] Thus, the relevant labor pool for statistical comparison was the lower level postmasters, most of whom, if not all, possessed the requisite qualifications and skill for promotion.

The district court also found a gross disparity between the percentage of women occupying low level postmaster positions (21.1%) and those occupying the higher level positions (5%).[8] *Id.* at 829-30. Specifically, the district

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[7] In response to one of Shidaker's interrogatories sent to the Postal Service after this court's prior remand regarding the qualifications for the higher level postmaster positions, the Postal Service stated:

> Assuming that plaintiff means to inquire whether women at the North Suburban MSC at the time plaintiff applied for the position of postmaster were less qualified than men for positions at levels 16 and above, defendant does not so contend except in one respect. In the years before 1977, men tended to be found in proportionately greater numbers in supervisory and managerial positions than women. As a result, they would gain the experience necessary for advancement to higher-level positions in proportionately greater numbers than women.

Ans. to Interrogatory No. 3.

[8] The district court summarized Shidaker's statistical evidence as follows:

> The statistics presented to the Court are as follows: In November, 1974, women held 20.8% of the positions in the Postal Service workforce. The percentage had moved to 23.5% by November, 1980. Nationally, women held 11.5% of the positions at PES 15 and above in January, 1980.
>
> In 1978, the year of Shidaker's failed promotion, women occupied 23 of the 108 post-master positions in the North Suburban MSC, or 21.1% of the total postmaster positions. However, none of the women postmasters were rated higher than PES 20 and 15 of them were at level PES 15 or lower. Additionally in 1977-78 a total of 2,008 women were employed in the North Suburban MSC, 29.4% of the entire Postal Service workforce in the area. Despite that overall percentage, only four women or 5% were

court found that none of the women postmasters was rated higher than PES-20.[9]

Once a plaintiff makes a *prima facie* showing with statistics of this nature, the burden shifts to the defendant to rebut the inference of discrimination raised by these statistics. *Washington v. Davis,* 426 U.S. 229, 241 (1976). Defendants may rebut a statistical *prima facie* showing of disparate impact with statistical evidence of their own that is "more refined, accurate and valid", *Movement for Opportunity and Equality v. General Motors,* 622 F.2d 1235, 1245 (7th Cir. 1980); *Teamsters v. United States,* 431 U.S. 324, 339-40 and 360 (1977), or by showing that the challenged standards causing the discriminatory pattern are job related. *Washington v. Davis,* 426 U.S. 229, 246-47 (1976); *Griggs v. Duke Power,* 401 U.S. 424, 431 (1971).

Thus, it is not up to Shidaker at this point to proffer evidence of lower level female postmaster employees qualifications or of the percentage of lower level female employees who applied for upper level positions. Although evidence of applicant flow may be relevant and probative, *Hazelwood,* 433 U.S. at 308 n.13, Shidaker is not required to present such evidence because she has established that a gross disparity exists between the percentage of women in the low level postmaster positions as compared to those in the higher level postmaster positions. We therefore remand Shidaker's disparate impact

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rated in positions of PES 19 or higher. *Grossly, the disparities could be significant.*

Shidaker v. Bolger, 539 F.Supp. 823, 835 (N.D. Ill. E.D. 1984) (emphasis added).

[9] *Cf. Johnson,* 107 S. Ct. at 1465 (O'Connor, J., concurring in judgment).

claim for further consideration by the district court. As we stated in our earlier opinion:

> [i]f [on remand] the Postal Service can come forward with evidence of a low percentage of female applicants for upper level jobs or evidence of the lack of qualifications of women in lower level positions, the Service might possibly rebut the inference of discrimination that arises from Shidaker's *prima facie* statistical showing. The Serivce might also be able to show the job-relatedness of its promotion standards. These determinations are best left in the discretion of the district court on remand, *Soria v. Ozinga Bros.*, 1704 F.2d 990, 995 n.6 (7th Cir. 1983), and are not properly before us for review.

782 F.2d at 749.

III.

Despite characterizations by the Postal Service, this is not a case in which the plaintiff seeks to apply a lower standard for proving a *prima facie* case. Here, Shidaker has done more than demonstrate an "imbalance" between minority representation in the higher and lower levels of the Postal Service's work force. Shidaker has proffered evidence which the district court found demonstrates a gross disparity between representation of women in the low level postmaster positions and the upper level postmaster positions. Because the lower level postmasters comprise the general pool from which high level postmasters are chosen, these statistics establish a *prima facie* case of disparate impact.

The judgment of the district court finding that Shidaker failed to make a *prima facie* showing of disparate impact is reversed, and Shidaker's disparate impact claim is remanded for further consideration. On remand, Circuit

Rule 36 will not apply. The district court's judgment in all other respects is affirmed.

A true Copy:
Teste:

/s/ THOMAS F. STRUBBE
Thomas F. Strubbe
Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-2791

DARLENE SHIDAKER, PLAINTIFF-APPELLANT

v.

PRESTON R. TISCH, IN HIS CAPACITY AS POSTMASTER GENERAL (UNITED STATES POSTAL SERVICE), DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 82 C 5635 – WILLIAM T. HART, *Judge*

December 14, 1987

ORDER

Before: Hon. WILLIAM J. BAUER, *Chief Judge*, Hon. WALTER J. CUMMINGS, *Circuit Judge*, Hon. JOEL M. FLAUM, *Circuit Judge*.

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause by Defendant-Appellee Preston R. Tisch, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

In addition, the opinion of this court in the above matter dated November 16, 1987, is hereby amended as follows:

Footnote 6 on page 8 should read: "Two of the three men selected for the positions to which Shidaker applied were postmasters. One of these was a PES-18, the same level as Shidaker. The third applicant was a Manager of Mail Processing, a PES-21 position."

The ninth line of page 8 also should be amended to read: "The only factor which seemed to distinguish the rankings of those deemed qualified was their past experience, not any particular skills."

IT IS SO ORDERED.

APPENDIX C

[ORDER LIST, MONDAY, April 6, 1987]

No. 86-468

TISCH, POSTMASTER GEN. OF U.S.

v.

SHIDAKER, DARLENE

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Johnson v. Transportation Agency*, 480 U.S. ____ (1987).

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-2791

DARLENE SHIDAKER, PLAINTIFF-APPELLANT

v.

PAUL N. CARLIN, IN HIS CAPACITY AS POSTMASTER GENERAL (UNITED STATES POSTAL SERVICE),
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Jan. 29, 1986]

Before: CUMMINGS, *Chief Judge,* and BAUER and FLAUM, *Circuit Judges.*

BAUER, *Circuit Judge.* This is an appeal by Darlene Shidaker from an adverse judgment entered below in favor of Paul N. Carlin in his capacity as Postmaster General of the United States Postal Service. Shidaker, a postal employee, claims that the Postal Service denied her a promotion because she is a woman and then demoted her for challenging that promotion denial as discriminatory. We reverse and remand for further consideration the district court's finding that Shidaker's promotion denial was not discriminatory. We affirm, however, the district court's finding tht Shidaker's demotion was not retaliatory.

I.

Shidaker was Acting Postmaster and then Postmaster of Kenilworth, Illinois from 1962 through 1982. In this position she was in pay scale category PES-18.

In 1977 Shidaker applied for vacant postmaster positions at Glenview, Palatine, and Franklin Park, Illinois. These positions were PES-22 positions. Ninety-two postal employees (the Postal Service follows a policy of promoting from within) applied for the vacant postmaster positions. Shidaker was the only female applicant. Shidaker was not promoted to any of the positions. The lower court found that two of the men who were promoted were better qualified than Shidaker and that the other promotee was as qualified as Shidaker.

In 1978 Shidaker filed an Equal Employment Opportunity ("EEO") complaint alleging that she was denied promotion to the PES-22 postmaster positions on the basis of sex. In 1980 an Equal Employment Opportunity Commission Complaint Examiner held a hearing on Shidaker's complaint. In September 1982 the Complaint Examiner issued a decision on the complaint finding that Shidaker was denied promotion on the basis of sex. In October 1982 the Postal Service's Regional Director for Employment and Labor Relations Central Region notified Shidaker that the Postal Service was rejecting the Examiner's decision.

On February 8, 1982 Shidaker received a "Proposed Notice of Reduction in Grade" from her immediate supervisor, Frank J. Santoro. Santoro's notice proposed that Shidaker be reduced from Postmaster, Kenilworth, PES-18, to distribution clerk, PES-5, because of alleged official misconduct. The notice informed Shidaker that she had the right under Postal Service regulations to answer the charges in the notice. The notice told her to direct her response to Santoro's superior, Richard Koenigs, District Manager of the Northern Illinois District, the official who would initially decide whether the demotion would occur.

Shidaker responded to Santoro's notice in two ways: she sent a letter to Koenigs answering the charges, and she filed a second EEO complaint. This complaint alleged that the proposed reduction in grade was in retaliation for her filing the first complaint challenging the promotion denial.

After Shidaker had answered Santoro's charges in her letter to Koenigs, Santoro wrote Koenigs a personal letter. In his letter Santoro responded to Shidaker's answers, alleged an additional ground for demoting Shidaker, and urged Koenigs to approve Shidaker's reduction in grade "for the good of the Service." Shidaker was unaware of this letter until after Koenigs approved her demotion.

Shidaker was eventually demoted to distribution clerk, PES-5. Shidaker filed an administrative appeal with the Postal Service from this reduction in grade and was accorded a full *de novo* hearing before a hearing officer appointed to examine the merits of her appeal. Shidaker was given a chance to respond to all charges and evidence including Santoro's letter to Koenigs. After the hearing, the Postal Service informed Shidaker by letter that the charges against her were supported by the evidence and that the demotion was warranted.

Shidaker sued the Postal Service in the United States District Court for the Northern District of Illinois, Eastern Division. Her complaint is in two counts. Count I alleges discriminatory failure to promote under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 and 39 U.S.C. § 409. Count II seeks review of Shidaker's administrative appeal of her demotion.

The district court made findings adverse to Shidaker on both counts and entered judgment accordingly. As regards Count I, the district court found that Shidaker failed to establish a *prima facie* case of discriminatory impact. The court found that Shidaker did make a *prima facie* showing of disparate treatment, but also found that the Postal Service demonstrated legitimate nondiscriminatory reasons for not promoting Shidaker that were not pretex-

tual. Shidaker's discrimination count was thus found to be without merit. As regards Count II, the district court found that there was substantial evidence to support the Postal Service's finding that Shidaker was demoted for misconduct and poor performance and not in retaliation for challenging her promotion denial. The court also found that the Postal Service's administrative review of Shidaker's appeal was in adequate compliance with its own procedural regulations. This appeal followed.

II.

Shidaker makes two main arguments on appeal, one charging error in the trial court's treatment of her discrimination claim and the other charging error in its treatment of her retaliation claim. First, Shidaker argues that the district court erroneously found that she failed to make a *prima facie* showing of discriminatory impact. She argues that when an employer follows the policy of promoting from within (that is, fills high level positions with lower level employees rather than bringing in "laterals"), a plaintiff need only show statistical evidence of an imbalance between the percentage of a minority occupying high level positions and the percentage of that minority occupying lower level positions in order to make a *prima facie* case of discriminatory impact. Second, Shidaker claims that Santoro's letter to Koenigs was an *ex parte* communication that violated the Postal Service's regulatory procedures and denied Shidaker due process of law.

We agree with Shidaker that she made an adequate *prima facie* showing of discriminatory impact. We therefore reverse the district court's findings and judgment to the contrary, and remand Shidaker's discriminatory impact claim for further consideration. We affirm the district court's judgment in all other respects, however, including its finding that despite Santoro's letter to Koenigs the Postal Service adequately complied with its own procedural regulations when demoting Shidaker.

A.

The district court incorrectly found that Shidaker failed to make a *prima facie* showing of discriminatory impact. Once Shidaker proved that the Postal Service promotes from within and introduced statistical evidence showing that there is a gross disparity between the percentage of women occupying lower level positions and upper level positions,[1] she made a sufficient *prima facie* showing of discriminatory impact. She need not, as the district court apparently thought, *Shidaker* v. *Bolger*, No. 82 C 5635, mem. op. at pp. 26-27 (N.D. Ill. E.D. 1984), make a further showing of the percentage of female applicants for upper level positions or the percentage of lower level female employees qualified for upper level positions.

To make a *prima facie* showing of discriminatory impact Shidaker need only present evidence that the Postal Service's promotion practices, although facially neutral,

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[1] The district court summarized Shidaker's statistical evidence as follows:

> The statistics presented to the Court are as follows: In November, 1974, women held 20.8% of the positions in the Postal Service workforce. The percentage had moved to 23.5% by November, 1980. Nationally, women held 11.5% of the positions at PES 15 and above in January, 1980.
>
> In 1978, the year of Shidaker's failed promotion, women occupied 23 of the 108 postmaster positions in the North Suburban MSC, or 21.1% of the total postmaster positions. However, none of the women postmasters were rated higher than PES 20 and 15 of them were at level PES 15 or lower. Additionally in 1977-78 a total of 2,008 women were employed in the North Suburban MSC, 29.4% of the entire Postal Service workforce in the area. Despite that overall percentage, only four women or 5% were rated in positions of PES 19 or higher. Grossly, the disparities could be significant.

Shidaker v. *Bolger*, No. 82 C 5635, mem. op. at 26 (N.D. Ill. E.D. 1984).

select promotees "in a significantly discriminatory pattern". *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). This evidence may be, and most often is, statistical in nature. *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 584 (1979); *Teamsters* v. *United States*, 431 U.S. 324, 339-40 (1977). Only in very limited instances may a court find discriminatory impact from non-statistical evidence. *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977); *Carpenter* v. *Board of Regents*, 728 F.2d 911, 914 (7th Cir. 1984).

Gross disparity between the racial or gender composition of the relevant labor pool and the composition of the group occupying the positions in question can, by itself, make a *prima facie* case of disparate impact. *Mozee* v. *Jeffboat*, 746 F.2d 365, 372 (7th Cir. 1984); *Clark* v. *Chrysler*, 673 F.2d 921, 927 (7th Cir. 1982), *cert. denied*, 459 U.S. 873 (1982); *Movement for Opportunity and Equality* v. *General Motors*, 622 F.2d 1235, 1244-45 (7th Cir. 1980); *See also, Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). Where a company is shown to promote from within, the relevant labor pool for upper level positions is the group of employees from which promotees will be drawn. *Hazelwood*, 433 U.S. at 308 n. 13; *Mozee* v. *Jeffboat*, 746 F.2d 365, 372 (7th Cir. 1984); *Movement for Opportunity and Equality* v. *General Motors*, 622 F.2d 1235, 1258 (7th Cir. 1980); *Paxton* v. *Union National Bank*, 688 F.2d 552, 563-64 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Fisher* v. *Procter & Gamble Mfg.*, 613 F.2d 527, 544 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981). Thus, where the plaintiff can show that the employer promotes from within, evidence of a gross disparity between the percentage of a minority in upper and lower level positions is sufficient to

make a *prima facie* case of disparate impact. *Mozee* v. *Jeffboat,* 746 F.2d 365, 372 (7th Cir. 1984); *Segar* v. *Smith,* 738 F.2d 1249, 1276-77 (D.C. Cir. 1984), *cert. denied sub nom. Meese* v. *Segar,* ____U.S. ____, 105 S.Ct. 2357 (1985); *Fisher* v. *Procter & Gamble Mfg.,* 613 F.2d 527, 544 (5th Cir. 1980).

Once a plaintiff makes a *prima facie* showing with statistics of this nature, the burden shifts to the defendant to rebut the inference of discrimination raised by these statistics. *Washington* v. *Davis,* 426 U.S. 229, 241 (1976). Defendants may rebut a statistical *prima facie* showing of disparate impact with statistical evidence of their own that is "more refined, accurate and valid", *Movement for Opportunity and Equality* v. *General Motors,* 622 F.2d 1235, 1245 (7th Cir. 1980); *Teamsters* v. *United States,* 431 U.S. 324, 339-40 and 360 (1977), or by showing that the challenged standards causing the discriminatory pattern are job related. *Washington* v. *Davis,* 426 U.S. 229, 246-47 (1976); *Griggs* v. *Duke Power,* 401 U.S. 424, 431 (1971).

Thus, it is not up to Shidaker to proffer evidence of lower level female employees' qualifications or evidence of the percentage of lower level female employees who applied for upper level positions. The burden is now on the Postal Service to bring forward evidence that few women occupying lower level positions have applied for upper level positions or are qualified for upper level positions, or to bring forward evidence of the job-relatedness of its promotion standards.

We must, therefore, remand Shidaker's discriminatory impact claim for further consideration by the district court. If the Postal Service can come forward with evidence of a low percentage of female applicants for upper level jobs or evidence of the lack of qualifications of

women in lower level positions, the Service might possibly rebut the inference of discrimination that arises from Shidaker's *prima facie* statistical showing. The Service might also be able to show the job-relatedness of its promotion standards. These determinations are best left in the discretion of the district court on remand, *Soria* v. *Ozinga Bros.*, 704 F.2d 990, 995 n.6 (7th Cir. 1983), and are not properly before us for review.

B.

The district court correctly found that the demotion procedure was in adequate compliance with Postal Service regulations. We reject Shidaker's claim that Santoro's letter to Koenigs was an *ex parte* communication that "voided" the demotion decision.

Shidaker alleges that the demotion procedure violated Postal Service regulations and thereby denied her due process. Specifically, Shidaker claims that Santoro's personal letter to Koenigs, sent after Shidaker responded to Santoro's notice of reduction in grade, was in violation of § 661.5 of the Postal Service's Disciplinary, Grievance and Appeal Procedures. That section provides that employees are to have notice and a chance to respond to charges against them when they are the subject of a proposed adverse action. Shidaker claims that this section was violated by Santoro's letter because Santoro's letter alleged an additional ground for demoting Shidaker and Shidaker was unaware of that letter until after Koenigs made the decision to demote her. The Postal Service apparently concedes that § 661.5 was violated here, and we, therefore, assume that it was.

It is well-settled that an agency must abide by its own regulations when discharging or disciplining an employee. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 389 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). Every minor deviation from pro-

cedural guidelines, however, does not amount to a denial of procedural due process sufficient to vitiate the entire administrative proceeding. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 558 (1978); *County of Del Norte v. United States,* 732 F.2d 1462, 1467 (9th Cir. 1984), *cert. denied sub nom. Assoc. of Cal. Water Agencies v. United States,* ____ U.S. ____, 105 S.Ct. 958 (1985); *Boylan v. United States Postal Service,* 704 F.2d 573, 577 (11th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1916 (1984); *Doe v. Hampton,* 566 F.2d 265, 277 (D.C. Cir. 1977). The question becomes one of determining the seriousness of the error by looking to possible prejudice resulting from such error. *Vermont Yankee Nuclear Power,* 435 U.S. at 558; *United States v. Lovasco,* 431 U.S. 793, 790 (1977); *Dozier v. United States,* 473 F.2d 866, 868 (5th Cir. 1973); *Wathen v. United States,* 527 F.2d 1191, 1200 n.9 (Ct. Cl. 1975), *cert. denied,* 429 U.S. 821 (1976).

If the procedure is found substantially defective because likely to prejudice the rights of individuals subjected to that procedure, the substantive merits of Shidaker's particular retaliation claim are irrelevant. *Greene v. United States,* 376 U.S. 149, 161-62 (1964); *Sullivan v. Dept. of the Navy,* 720 F.2d 1266, 1273-74 (Fed. Cir. 1983); *Ryder v. United States,* 585 F.2d 482, 487-88 (Ct. Cl. 1978). We are thus unconcerned with whether, absent the *ex parte* communication from Santoro to Koenigs, Koenigs would have reached the same decision to demote Shidaker. The test is not whether the procedural defect caused actual prejudice to the rights of the party before the court. *Greene v. United States,* 376 U.S. 149, 161-62 (1964); *Simmons v. United States,* 348 U.S. 397, 405-06 (1955). The test is an objective one, whether the particular procedural defect is so substantial and so likely to cause prejudice that no claimant can fairly be required to be subjected to adverse action under such a flawed proceeding. *United States v.*

Lovasco, 431 U.S. 783, 790 (1977); *Vitarelli v. Seaton*, 359 U.S. 535, 540-46 (1959); *Sangamon Valley Television v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959).

Although we view this as a close case, we cannot say that the letter from Santoro to Koenigs was such a serious departure from Postal Service procedures that it vitiated the entire process. Even though this was an *ex parte* communication and in violation of Postal Service regulations, the defect was not so substantial that it would unfairly prejudice the rights of claimants reviewed under procedures having this defect.

Certainly other cases have found that certain *ex parte* communications from an adversary to a neutral administrative decision-maker in the context of an employee discharge or demotion were by themselves procedural defects substantial enough to vitiate the entire administrative proceeding. *Sullivan v. Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983); *Ryder v. United States*, 585 F.2d 482 (Ct. Cl. 1978; *Camero v. United States*, 375 F.2d 777 (Ct. Cl. 1967); *Sangamon Valley Television v. United States*, 269 F.2d 221 (D.C. Cir. 1959). We cannot, however, conclude from these cases, as Shidaker argues, that every *ex parte* communication is sufficient by itself to undermine the integrity of an administrative proceeding. Many other cases have found *ex parte* communications in administrative proceedings to be harmless error. *Pinar v. Dole*, 747 F.2d 899, 906 (4th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2019 (1985); *Chrysler Corp. v. Federal Trade Commission*, 561 F.2d 357, 362 (D.C. Cir. 1977); *Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977); *Korman v. United States*, 462 F.2d 1382, 1388 (Ct. Cl. 1972); *Salter v. United States*, 412 F.2d 874 (Ct. Cl. 1969). Not every *ex parte* communication is a procedural defect so substantial and so likely to cause prejudice that it entitles the claimant to an entirely new administrative proceeding.

Several aspects of this *ex parte* communication convince us that it is not such a substantial procedural error that Shidaker or other claimants subjected to such a defective procedure are entitled to a new proceeding. First, the degree of departure from regulatory guidelines was minor. The regulations did not guarantee Shidaker that Santoro would not respond to her answer. They simply gave her the right to answer all charges and allegations made against her before the demotion decision would be made. Therefore, Santoro's letter violated Postal Service procedures only to the extent that it alleged an additional ground for demoting Shidaker. This it did in one sentence stating that "[Shidaker's] community relations also leave much to be desired as evidenced by correspondence previously submitted to you." Although the Postal Service apparently admits that this single sentence was in violation of regulations, we do not find that it amounts to the type of extended, substantial, and adversarial *ex parte* communication in blatant violation of known procedural guidelines that has been found fatally defective in other cases. *Sullivan v. Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983) (supervisor, angered by employee's filing of grievance against him, instigated investigation by FBI and Naval Investigative Service into employee's work habits, directed department head to recommend employee's removal on basis of evidence discovered in investigation, encouraged hearing officer by *ex parte* communication to recommend employee's removal, and encouraged reviewing officer by repeated *ex parte* phone calls to finalize employee's removal); *Ryder v. United States*, 585 F.2d 482 (Ct. Cl. 1978) (supervisor, who had recommended employee for discharge on grounds of inefficiency, wrote a lengthy signed *ex parte* statement to the officer who was reviewing the hearing examiner's findings, which statement the officer adopted *in toto*); *Camero v. United States*, 375 F.2d 777 (Ct. Cl. 1967) (attorney, who

represented agency at hearing reviewing agency's discharge of employee, engaged in on-going *ex parte* discussion of case with officials who reviewed that hearing committee's recommendation); *Brown v. United States*, 377 F. Supp. 530 (N.D. Tex. 1974) (prosecutor for agency that discharged employee flew with hearing officer to hearing, discussed case with hearing officer on plane, stayed in hearing officer's hotel, and discussed case after hearing with hearing officer in car on way back to airport).

Second, the "additional ground" alleged in Santoro's letter was "additional" to the charges in the "Proposed Notice of Reduction in Grade" but was cumulative to other information that Koenigs had already reviewed in regard to Shidaker's performance. Santoro's letter itself reveals that Shidaker's poor community relations were "evidenced by correspondence previously submitted." We thus view Santoro's *ex parte* communication less harshly since there is less concern with claimants being unaware of evidence and charges against them when evidence is cumulative to that already before the decision-maker. *Doe v. Hampton*, 566 F.2d 265, 277 (D.C. Cir. 1977) (harmless error where evidence, obtained in violation of regulations and to which claimant had no chance to respond, was cumulative); *Dozier v. United States*. 473 F.2d 866, 868 (5th Cir. 1973) (same); *Salter v. United States*, 412 F.2d 874, 877-78 (Ct. Cl. 1969) (*ex parte* communication harmless error where evidence submitted thereby is cumulative).

Third, the minor procedural error of Santoro's *ex parte* communication was mitigated by Shidaker's knowledge of it, and chance to respond to it, in the full *de novo* hearing at which Koenig's decision was reviewed. We certainly acknowledge that an *ex parte* communication can be so prejudicial that it cannot be "cured" by subsequent review. *Sullivan*, 720 F.2d at 1273; *Ryder*, 585 F.2d at 486-87. Where the communication is already unlikely to do any

harm, however, we are reluctant to require a reviewing agency that discovers a minor procedural error to reinstitute an entirely new proceeding rather than rectify that error by giving the employee full opportunity to respond to the new charges and evidence in the communication. Here, Shidaker knew of the existence and contents of Santoro's letter to Koenigs before the full *de novo* hearing reviewing her demotion. She had full opportunity to respond to the additional charge and present evidence to the contrary. Whatever damage might possibly have been done by the *ex parte* communication Shidaker had full opportunity to undo.

Finally, we are reluctant to apply a stringent procedural standard in this particular case since we are not firmly convinced that the regulations give Shidaker the right to have Koenigs act as a neutral decision-maker. Shidaker was certainly entitled to have Koenigs consider her response to charges against her. This, however, would be a sensible requirement for any agency concerned with demoting only those employees that deserve such adverse action. The regulations can thus be interpreted in two ways: as allowing Koenigs to act adversely to Shidaker in the interest of the Postal Service, or as giving Shidaker the right to have Koenigs act as a neutral decison-maker. Santoro clearly was not required to act neutrally towards Shidaker while the hearing examiner reviewing Koenigs' decision clearly was. The problem is that Koenigs' function lies somewhere in between these two roles of the Postal Service in the administrative review process. Although we do not rest our decision solely on this basis, Koenigs' uncertain role as neutral decision-maker makes us unwilling to apply the high standard of procedural protection designed for adjudicatory proceedings.

III.

We find Shidaker's other bases for appeal to be completely without merit. The district court's findings as to the promotees' qualifications were not undermined by the fact that documents underlying the promotion committee's decision are now unavailable, and there is sufficient evidence to find that Shidaker was demoted for misconduct and poor performance and not in retaliation for challenging her promotion denial as discriminatory.

The judgment of the district court finding that Shidaker failed to make a *prima facie* showing of discriminatory impact is reversed, and Shidaker's disparate impact claim is remanded for further consideration. On remand, Circuit Rule 18 will not apply. The district court's judgment in all other respects is affirmed.

APPENDIX E

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, E.D.

No. 82 C 5635

DARLENE SHIDAKER, PLAINTIFF

v.

WILLIAM BOLGER, IN HIS CAPACITY AS POSTMASTER GENERAL (UNITED STATES POSTAL SERVICE), DEFENDANT

[Aug. 23, 1984]

FINDING OF FACT – CONCLUSIONS OF LAW AND ORDER

WILLIAM T. HART, District Judge.

Plaintiff Darlene Shidaker ("Shidaker") sued her employer William Bolger in his capacity as Postmaster General of the United States Postal Service ("Postal Service"). Count I alleges discriminatory failure to promote under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 and 39 U.S.C. § 409. Count II seeks review of an administrative appeal of Shidaker's reduction in grade by the Postal Service. Plaintiff alleges that the reduction was in retaliation for her attempt to vindicate the alleged discriminatory failure to promote. Judicial review of the entire administrative record of Shidaker's reduction in grade is limited to determining whether the Postal Service's ostensible reason for the grade reduction, Shidaker's alleged poor performance, is supported by substantial evidence and was not arbitrary or capricious. *Coffman v. Bolger*, 590 F.2d 1366 (5th Cir. 1979); *Alsbury*

v. United States Postal Service, 530 F.2d 852 (9th Cir.), *cert. denied* 429 U.S. 828 (1976); *Oates v. United States Postal Service*, 444 F.Supp. 100 (S.D.N.Y.1978).

FINDINGS OF FACT

A hearing was held by the Court. Shidaker was not called as a witness. Based on the final pretrial order, which is incorporated by reference, and the testimony before the Court, the Court finds the following facts, as of the relevant times, many of which are adopted from the parties' statement of uncontested facts:

(1) Shidaker, began her Postal Service career on September 21, 1962, as Acting Postmaster of Kenilworth, Illinois. She was converted to Postmaster, Kenilworth, Illnois on May 8, 1964. This position was a PES-18.

(2) When Shidaker was appointed Acting Postmaster in Kenilworth, Illinois, it was her first employment in any capacity with the Postal Service or its predecessor Post Office Department, United States of America.

(3) Prior to her appointment at Kenilworth, Shidaker's employment experience was as follows:

1956-1958—Executive Secretary, "Business Week" (McGraw-Hill), Chicago, Illinois, earning $350.00 per month;

1958-1961—Office work, Stivers Officer Service, Chicago, Illinois, earning $4.00 per hour;

1961-1962—Office Manager, Jack Bullock & Associates, Chicago, Illinois, earning $100.00 per week.

(4) The Kenilworth Post Office is an associate post office of the North Suburban Metropolitan Service Center ("MSC"). The associate post offices employ approximately 5,000 employees, including postmasters and supervisors. In 1977 there were 108 associate post offices within the North Suburban MSC. Since 1977, one associate post office has been eliminated, leaving 107.

(5) Kenilworth is the smallest of the associate post offices according to the number of city delivery routes and rural delivery routes. It is a "Class C" post office, which embraces the associate post offices with the smallest delivery operations. In "Class C," Kenilworth ranks with the bottom six post offices by size of delivery operations:

Kenilworth	—3 City delivery routes
Fox River Grove	—3 City delivery routes
Genoa	—3 City delivery routes
Marengo	3 City delivery routes and 3 —rural routes
Winfield	—3 City delivery routes
Wihthrop Harbor	—3 City delivery routes

(6) The Kenilworth post office is located in northern Cook County, Illinois. It serves a village with a population of 3,000. The area is not growing and contains only small commercial establishments and no industrial firms. There are three letter carrier routes. At the relevant time, the authorized complement of employees was 11, including a PES-18 postmaster, one supervisor and four part-time employees. Revenue for fiscal year 1977 was $112,297. In 1978, the position of supervisor was eliminated and the post office was downgraded to PES-15.

(7) On August 18, 1977, Shidaker applied for the vacant PES-22 level postmaster positions at Glenview, Palatine, and Franklin Park, Illinois.

(8) Franklin Park is a medium size first class post office, located in the western section of Cook County serving a population of 35,000. The town contains small industrial and commercial firms, several large manufacturing businesses as well as a switch-yard. There are 29 city routes and four auxiliary routes. The authorized complement of employees is 89, which includes a PES-22 postmaster, seven supervisors and 16 part-time employees. Revenue for fiscal year 1977 was $5,453,725 and operating expenses were $1,674,781.

(9) Palatine is a medium size first class post office located in central Cook County in an area of rapid residential and commercial growth. The office serves a population of 70,000. There are 42 city routes, one rural route and three auxiliary routes. The authorized complement of employees is 109, which includes a PES-22 postmaster and six supervisors. Revenue for fiscal year 1977 was $2,588,283 and operating expenses were $2,094,581.

(10) Glenview is a medium size first class post office located in the northern part of Cook County in an area of growing residential and commercial activity. The office serves a population of 52,000. There are 45 city routes and six auxiliary routes. The authorized complement of employees is 114, which includes a PES-22 postmaster and seven supervisors. Revenue for fiscal year 1977 was $3,648,185 and operating expenses were $2,121,720.

(11) Frank J. Santoro ("Santoro") has been Manager of the North Suburban MSC since August 14, 1976. Santoro and his staff supervise the operation of all of the associate post offices within the jurisdiction of the North Suburban MSC. Santoro and his staff are ultimately responsible for the efficient operation of the associate post offices, providing advice and supervision in such areas as mail processing, customer services, finance and employee and labor relations. Santoro also is responsible for the efficient operation of the North Suburban main mail facility which employs approximately 3,000 employees, including Santoro and his staff and the employees who sort the mail for the associate post offices. Santoro is the immediate supervisor of each associate postmaster.

(12) The North Suburban MSC is subordinate to the Northern Illinois District Office, Oakbrook, Illinois. That Office supervises several MSC's in Northern Illinois. Santoro's immediate supervisor is the Manager, Northern Illinois District. The current District Manager is Richard Koenigs. His predecessor was William Booras ("Booras").

(13) The Northern Illinois District is subordinate to the Regional Postmaster General (RPMG) for the Central Region. The Central Region encompasses 13 states, including Illinois. The RPMG and his staff are located in the Main Post Office, 433 W. Van Buren Street, Chicago, Illinois. The Postmaster General, Washington, D.C., is the immediate supervisor of the (RPMG), Central Region as well as the RPMGs for the Northeastern, Eastern, Southern and Western Regions.

(14) During the relevant time period, the Postal Service had an affirmative action program for women, sometimes referred to as the "women's program."

(15) There were a total of 92 applicants for the postmaster positions in Glenview, Palatine, and Franklin Park, and Shidaker was the only female among them.

(16) The Postal Service has a policy of promoting from within. Ordinarily promotions are made one step at a time, *e.g.*, from a PES-20 to 21.

(17) On November 3, 1977, a Postmaster Screening Board, composed of W. Robert Sleep, Postmaster, Northbrook; Ralph Wright, Postmaster, Oak Park and former postal inspector with jurisdiction over the Kenilworth post office; Richard Skala, Director Customer Services North Suburban MSC; and Walter L. Besteda, Director, Employee and Labor Relations, North Suburban MSC, met to review applications and screen candidates for the positions of Postmaster, Glenview, Palatine, and Franklin Park, Illinois. Besteda is black. No woman was on the Screening Board.

(18) The Screening Board did not interview the applicants. Each Screening Board member scored each applicant individually, for each vacancy, and the results were cumulated. In evaluating the applicants, including Shidaker, the Board had available:

> (a) the applicant's "Personal History Summary" which showed the applicant's educational background, including Postal Service courses taken,

Postal Service employment experience, non-Postal Service employment experience, participation in civil, fraternal and professional organizations, and awards;

(b) the applicant's "Estimate of Potential" (PS 2577) prepared and submitted by the applicant's immediate supervisor. Form 2577 rates factors such as "motivation," "personal growth," and "capacity to learn."

(c) the applicant's "Analysis of Experience, Background and Potential" which showed the applicant's experience and performance in such matters as labor relations, Equal Employment Opportunity, decision making (problem solving), budget operations, employee development, supervision, supervision of branch operations, planning and scheduling of work, safety and health, customer and community relations and general observations;

(d) the applicant's personnel file; and

(e) any relevant personal knowledge that the Board members had concerning the applicant's work performance. The Screening Board also had available data concerning the community, employee complement, number of carrier routes and dollar revenue of each of the vacant post offices.

(19) During their meeting on November 3, 1977, the Screening Board first evaluated the applicants to determine those who did not meet the minimal qualifications for the three positions. These applicants were given no consideration for the positions. Eleven male applicants, fifteen male applicants and sixteen male applicants, were not considered minimally qualifed for the postmaster positions in Franklin Park, Palatine, and Glenview, respectively.

(2) The Screening Board next evaluated those applicants, including Shidaker, who were determined to be at

least minimally qualifed for the positions. In evaluating these applicants, each Screening Board member used the following scoring system:

8-7: Outstanding Candidate
6-5: Very Good Candidate
4-3: Acceptable Candidate

When the scores were tallied, the highest score an applicant could receive was thirty-two. The Screening Board decided not to recommend further consideration of those candidates who received less than twenty points.

(21) At each of the three post offices there were one or more applicants who were automatically entitled to be interviewed and considered for the vacant position. The Screening Board did not evaluate these applicants.

(22) In connection with the review of Shidaker for promotion, both Besteda and Wright testified to advising the Screening Board of their first-hand knowledge of the conditions of the post office run by her. Wright, as a postal inspector, had investigated an instance of poor security in connection with the issuance of money orders and he described Shidaker's management as sloppy. Wright stated that he told the Screening Board that Christmas mail deliveries were two or three days late. Besteda also told the Screening Board that the Kenilworth post office was not well managed.

(23) There were 32 applications for the Postmaster of Glenview, and Shidaker was the only female. She received a numerical rating of 13, which placed her in the thirteenth position of 16 qualified applicants. The remaining 16 were deemed unqualified and were not numerically rated. The Screening Board recommended seven male applicants as "qualified and able to assume the duties of the position" at Glenview. Their scores ranged from 20 to 24.

(24) There were 32 applicants for Postmaster of Palatine, and Shidaker was the only female. She received a numerical rating of 11, which placed her in the sixteenth

position of the 17 qualified applicants. The remaining 15 were deemed unqualified and were not numerically rated. The Screening Board recommended seven male applicants as "qualified and able to assume the duties of the position" at Palatine. Their scores ranged from 20 to 24.

(25) There were 28 applicants for Postmaster of Franklin Park, and Shidaker was the only female. She received a numerical rating of 11 which placed her in the fifteenth position of the 17 qualified applicants. The remaining 11 were deemed unqualified and were not numerically rated. The Screening Board recommended seven male applicants as "qualified and able to assume the duties of the position" at Franklin Park. Their scores ranged from 20 to 24.

(26) Plaintiff was not selected for any of the above vacant postmaster positions.

(27) By letters dated December 21, 1977, and January 4, January 5 and March 21, 1978, Santoro sent his immediate supervisor Booras the names of applicants eligible for consideration for the vacancies. Some of the names submitted to Booras were from the lists of applicants recommended by the Screening Board as "qualified and able to assume the duties of the position." The other names sent forward by Santoro were applicants employed at Franklin Park, Palatine and Glenview who had a right to automatic consideration for the vacant positions in their respective offices.

(28) The applicants designated in Santoro's letters to Booras were interviewed by the Regional Management Selection Board ("RMSB") of which Gilbert Brown, Regional Postmaster Selection Officer, was the executive secretary. The RMSB then recommended to the Postmaster General one applicant for consideration for each vacancy on the basis of the applicant's performance during the interview and his qualifications reflected in the materials, *e.g.* personal history summaries, and estimates of potential.

(29) The Postmaster General selected the following applicants to fill the positions:

a. *Postmaster at Franklin Park:*
Robert G. Boeckenhauer ("Boeckenhauer")
Manager, Mail Processing (PES-21)
Des Plaines, Illinois

b. *Postmaster at Palatine:*
James A. Daily ("Daily")
Postmaster (PES-20)
Bloomingdale, Illinois

c. *Postmaster at Glenview:*
William J. Soto ("Soto")
Postmaster (PES-18)
Algonquin, Illinois

Soto's name was not among those initially submitted by Booras for consideration for the Glenview vacancy. He had received only 19 points when he was evaluated by the Screening Board. However, some of those candidates who had earned 20 points and had been submitted for consideration withdrew. Thereafter, Santoro added Soto's name to the list of applicants to be considered for Glenview.

(30) Boeckenhauer's promotion was from a PES-21 position. He had 21 years of service and was serving in grade 21 since March of 1973. The Des Plaines Post Office is grade level PES-24. It serves a population of 105,000. There are 83 regular and three auxiliary routes. The authorized complement of employees is 232 including 14 supervisors.

(31) Daily's promotion was from PES-20. He had 12 years of service and was serving in grade 20 since August of 1975 as postmaster of the Bloomingdale, Illinois 60108 post office. That post office serves a population of 11,500. It is grade level PES-20. There are six regular and three auxiliary routes. The authorized complement of employees is 16 including one supervisor.

(32) Soto's promotion was from PES-18. He had 15 years of service and was serving in grade 18 since being appointed postmaster of Algonquin, Illinois in November of 1974. Algonquin, Illinois 60102 serves a population of 14,000. It is grade level PES-18. There are three regular and one auxiliary routes. The authorized complement of employees is 15 including one supervisor and five part-time employees. Revenues for fiscal year 1977 were $237,000 and operating expenses were $259,325. Soto's entry level position with the Postal Service was at level four, as a temporary carrier at Geneva, Illinois. He received six promotions before being appointed postmaster at Algonquin.

(33) The selected candidates were all given positive ratings by their immediate supervisors.

(34) During 1977 and 1978 the statistical breakdown by gender of the Postal Service's work force in the North Suburban MSC was as follows:

PES Level	*M*	*F*	*%F*
1-27	5,309	2,208	29.4
19-27	76	4	5.0

(35) According to data introduced by Shidaker in November 1974, there were 20.8% women in the Postal Service's workforce nationally, including postmasters. In the first quarter of 1980, the percentage was 23.51%. In January of 1980, women held 11.5% of the national Postal Service positions in PES levels 15 and above.

In 1978, women held 23 or 21.2% of the 108 postmaster positions in the North Suburban MSC. None of them was ranked higher than PES-20. The breakdown is:

PES-20—2
PES-18—4
PES-17—2
PES-15—5
PES-12—9
PES-03—1

(36) No evidence of applicant flow was presented.

(37) On April 28, 1978, Shidaker filed an Equal Employment Opportunity ("EEO") complaint alleging that she was denied promotion to the PES-22 level postmaster positions on the basis of sex.

(38) On February 27, 1980, a hearing on Shidaker's complaint was held before Equal Employment Opportunity Commission ("EEOC") Complaint Examiner Robert Johnson ("Johnson").

(39) In a decision dated September 2, 1982, Johnson found that Shidaker was denied promotion on the basis of sex. He also found that the procedure used by the Postal Service to make the promotions had a discriminatory impact on women. He did not, however, find discriminatory the fact that no woman was on the Screening Board.

(40) In a letter dated October 25, 1982, the Postal Service's Regional Director for Employee and Labor Relations Central Region, informed Shidaker that the Postal Service was rejecting Johnson's decision of September 2, 1982.

(41) While Shidaker's EEO complaint was pending, Santoro rated her "marginal" on her merit performance evaluations for fiscal years 1980 and 1981. Prior to 1980 she had never received anything less than a "satisfactory" rating. A marginal rating denies an employee a salary increase.

(42) No female postmasters except Shidaker received "unsatisfactory" or "marginal" merit evaluations in 1980, 1981, and 1982. Santoro gave three male postmasters "unsatisfactory" merit evaluations in 1978. In 1979, Santoro gave two male postmasters "marginal" merit ratings. In 1980, Santoro gave three male postmasters "marginal" ratings. In 1981, Santoro gave one male postmaster a marginal rating. In 1982, Shidaker was the only postmaster to receive a "marginal" rating. In 1983, two male postmasters were given "marginal" ratings.

(43) Santoro's written comments accompanying Shidaker's evaluation in 1980 indicate:

> Ms. Shidaker rated herself "Good" but she received a "Marginal" rating because of poor performance in all major areas of her office. Blames her supervisor for performance of office. Negative performance in carrier operation of 8.2% even after discounting Accounting Periods 4 and 5 due to severe weather. Clerk productivity down 1.7% vs SPLY [Same Period Last Year]. Needs to become more directly involved in office operations and to improve her attitude and cooperation with MSC staff. [Bracketed words added].

(44) On April 28, 1980, Shidaker was issued a "Proposed Notice of Adverse Action." The Notice informed her that Santoro proposed to remove (discharge) her from employment for incidents of "misappropriation and personal use of postal funds," and for "misrepresentation of work hours." The dates alleged were October 8, 1978, August 17, 1979, November 19, 1979 and January 17, 1980. The incidents involved the alleged unauthorized issuance of postal money orders in the amounts of $20.00 and $35.00 for personal annual membership fees in an organization called "Women In Management," the unauthorized purchase with Postal Service funds of a Village of Kenilworth motor vehicle sticker for Shidaker's personal automobile; and taking 32 hours of leave but knowingly entering the time as worked on her time card rather than charging the absence to annual leave.

(45) On September 3, 1980, Shidaker, who was represented by counsel, entered into an EEO settlement of the notice of removal. The settlement agreement provided, in pertinent part, that she would be reduced "from a step

six to step three in the EAS[1] 18 pay scale." This reduction in pay amounted to approximately Three Thousand Dollars ($3,000.00).

(46) In 1981, Santoro wrote on Shidaker's evaluation form: "Employee rated 'marginal' because of misappropriation of postal funds."

(47) On February 8, 1982, Santoro issued Shidaker a "Proposed Notice of Reduction in Grade." It was proposed that due to her alleged official misconduct she be reduced from Postmaster, Kenilworth, Illinois, PES-18 at a salary of $26,300, to a full-time distribution clerk, PES-5, Step 12, at a salary of $22,325.00.

(48) Shidaker ultimately was reduced in grade to a level PES-5, full-time regular distribution clerk.

(49) On February 18, 1982, Shidaker filed a written EEO complaint, claiming that the February 8, 1982 notice of grade reduction was issued in reprisal for filing on April 28, 1978 her EEO administrative complaint concerning the failure to be promoted. She scheduled an appointment to discuss the prior EEO complaint with a Postal Service EEO Investigator.

(50) Shidaker previously had filed timely EEO complaints alleging that the marginal ratings for 1980 and 1981 were issued in retaliation for her filing of the EEO complaint in 1978. By a decision dated August 6, 1982, the EEOC issued a final administrative determination that Shidaker's marginal rating for fiscal years 1980 and 1981 did not violate Title VII. Shidaker renewed the claims of retaliation in her civil complaint but abandoned them before trial.

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[1] There is some confusion over the designation of pay scale categories, *i.e.*, "PES, "PMS" or "EAS." Each designation likely is correct, depending on the year in question. For example, in 1980 the "EAS" designation apparently replaced the "PES" rating. For ease the Court adopted the "PES" designation, except where the rating appears within a quotation.

(51) Shidaker also filed an administrative appeal from her reduction to a PES-5 distribution clerk. By letter dated March 1, 1983, the Postal Service informed her that its final decision was that the charges against her were supported by the evidence and warranted the reduction.

(52) The meaning and purpose of the 16 item Model Delivery Office ("MDO) Checklist," which is part of the Postal Service's Exhibit 22, is as follows:

Item 1. "Minimum—80% Mail Volume
a. Mail ledged for carrier."

The purpose of Item 1 is to have at least 80% of the morning mail volume at each post office sorted by the clerks and at each letter carrier's sorting case when the carrier starts work. Before the carrier leaves the post office to deliver his or her route, he or she must "case" the mail that is, sort it in sequence of delivery, by street and address. The carrier "cases" the mail by sorting it into designated separations ("pigeon holes") in the carrier's case. Each carrier case has a "mail ledge" at the front of the case where the mail is placed for "casing." The mail is placed on the ledge, stamp side down and to the carrier's right hand side to ensure efficient casing.

Item 3. "DUVRS
a. Data used for workhour decisions."

"DUVRS" means "Delivery Unit Volume Recording System." It requires the measurement with a foot rule of the daily mail volume ultimately delivered by the letter carrier. It is estimated that a linear foot of letter size mail contains 250 pieces. "Flats", such as magazines and other magazine size mail, contain 115 pieces per linear foot. These daily measurements are made so that supervisory and managerial employees can decide whether a carrier needs overtime, auxiliary assistance by another carrier or curtailment of mail on a given day or whether individual carriers have insufficent volume ("undertime") to fill an eight hour day.

Item 4. "Workload Leveling."

The objective of workload leveling is to ensure that each carrier has sufficient mail to fill an eight hour day. "Leveling" is achieved by curtailing the delivery of mail on a given day and also by dividing mail between carriers so that each has enough mail to fill an eight hour day.

Item 5. "Carrier Control Forms."

Item 5 requires the daily review of workhour control forms and mail volume curtailment forms. The purpose of this review is *inter alia* to reduce the need to curtail the delivery of mail; to eliminate problems of carriers leaving the office late to deliver their routes; to eliminate problems of late delivery of mail; to eliminate problems of excess overtime; and to correct problems of carrier work methods.

Item 6. "Pivoting."

Pivoting involves assigning carriers having "undertime" to assist carriers who have more mail than they can deliver in eight hours. Effective pivoting requires daily knowledge of the mail volume of each carrier.

Item 7. "Reporting Times.
a. Supervisors
b. Carriers
(1) 80% Mail Volume
(2) FLSA"

This item requires that the starting times of supervisors and carriers be checked and coordinated so that the supervisor, or other responsible person, starts work ahead of the carriers to ensure *inter alia* that 80% of the mail volume is sorted by the clerks and at the carrier's case when the carrier starts work. It also is required that the carrier's starting time be scheduled so that the carrier does not start before the 80% requirement is met.

The Fair Labor Standards Act ("FLSA") aspect of the program requires responsible management or supervisory personnel to monitor the times that employees punch in and out, or otherwise start and end work, so that they do so at appropriate times in order to avoid unearned overtime under FLSA.

Item 8. "Park Points."

a. Five or less unless otherwise justified.

Letter carriers who drive their routes, drive to various points, park and lock their vehicles and deliver a portion of the mail. The purpose of restricting parking points to five or fewer points is to save gasoline, unnecessary mileage and time otherwise lost by unnecessary parking and locking and mounting and dismounting the vehicle.

Item 9. "Relays.

a. Weighted In Office."

A relay is a segment of a carrier's route which weighs approximately 30 pounds, the weight a carrier carries and delivers at a given time. The relays are weighed at the post office so that the 30 pound requirement is met for each relay. The purpose is to assure the minimum possible relays thereby avoiding unnecessary relays and wasted time.

Item 10. "Office Supervision."

The purpose of office supervision is to ensure that employees observe proper starting and stopping times, use efficient work methods and observe the other rules of the workplace.

Item 11. "Street Supervision."

The purpose of street supervision is to ensure that carriers are using efficient work methods and observing pertinent work rules. Street supervision includes checking whether the carrier is taking appropriate short cuts,

following efficient delivery patterns, unnecessarily deviating from the route and taking lunch and other breaks at designated times and locations.

Item 12. "Mobile Accountable Cart."

Item 12 is a system by which accountable mail, *e.g.*, registered, certified, C.O.D. and postage due mail, is brought to the carrier at his or her case in order to save time.

Item 13. "Parking and Loading."

The purposes of "Parking and Loading" include checking for the most efficient parking places for Postal Service vehicles in order to avoid interference with official vehicle operations and designated customer parkings; and checking whether employees efficiently load vehicles for sequential route delivery; make a minimum number of trips from office to the vehicle; and how they transport mail to the vehicle.

Item 14. "Review PS Forms 4570."

A PS Form 4570 is a Vehicle Trip Report, documents daily starting and ending times and mileage. Its purpose is to ensure proper utilizaton of the vehicle. For example, review of the forms ensures that the reports are made; forms are accurately filled in; unauthorized mileage is not used; and mileage rates are accurate.

Item 15. "Carrier Route Books."

Route books are checked to verify that they contain required information. For example, they must contain the route map; any special instructions for the route; the form which reflects designated break and lunch times and designated lunch locations; and the M-41 handbook which is the carrier work method book.

Item 16. "Carrier Case Labels."

These are strip labels of various colors ("color coded") which bear the street name and delivery addresses in delivery sequence. These labels are affixed to the appropriate pigeon holes in the letter carrier's sorting case. It is required that the labels be typewritten and color coded. Color coding results in separations for letters and flats with the same destination bearing the same color.

(53) Defendant's Exhibit 64 is a "Daily Condition Report" form. It is used during specified accounting periods, including the Christmas season period of heaviest mail volume. Column 1 lists four post offices within the North Suburban MSC. Lake Bluff, Kenilworth and Morton Grove are required to call in to the Park Ridge Post Office the information in columns two through eight daily by a specified time. Column two reports the number of city delivery routes. Column three reports the total number of trays, 500 pieces of first class ("pref") mail per tray that the clerks have not sorted by their "cut off time," the time they were required to stop sorting mail. "Pref mail" includes personal letters, registered letters, and certified return, receipt mail. "Non Pref" mail includes magazines and advertisements. Column four reports the total number of trays of "pref" mail that have not been sent to the carriers' cases at the clerks' cut off time. Column five reports the number of carrier routes which have curtailed, *i.e.*, not to be delivered, "pref" mail. Column six reports the number of routes with three or more trays of curtailed "pref" mail. Column seven reports any "nonpref" mail more than one day behind in delivery. Column eight reports any parcel post mail more than one day behind in delivery.

One of the main reasons for acquiring this daily information during the Christmas season is to ensure the timely delivery of the mail by post office to post office assistants

and other means. Management personnel also need this daily information so that they can readily answer inquiries from the public concerning the status of mail delivery during the peak season.

CONCLUSIONS OF LAW

Shidaker attempts two theories for proving a Title VII violation relative to her failure to win promotion: (1) the Postal Service's procedure for selecting candidates for promotion to postmaster has a "disparate impact" on women; and (2) the Postal Service intentionally discriminated against her by promoting a male instead of her, although she was qualified.

DISCRIMINATORY IMPACT

A plaintiff makes a *prima facie* case of discriminatory impact merely by showing that the employer's facially neutral criteria for hiring or promotion have an adverse impact on a protected class to which he or she belongs. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 153 (1971). Unlike a case of "disparate treatment," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817. 30 L.Ed.2d 668 (1973), proof of wrongful motive is not required. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977). Where an individual brings a discriminatory impact claim, a *prima facie* showing is not overcome by the employer's subsequent attempt to minimize the discriminatory impact of the procedure by favoring some members of the protected group. Title VII provides an *equal* opportunity for each applicant, and " '[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.' " *Connecticut v. Teal*, 457 U.S. 440, 454-55, 102 S.Ct. 2525, 2534-2535,

73 L.Ed.2d 130 (1982), quoting *Furnco Construction Co. v. Waters*, 438 U.S. 567, 579, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978).

Prima facie adverse impact is demonstrated by various statistical means, depending on the nature of the challenged practice and the employer. Regardless of the method chosen, the plaintiff must present supporting statistical data with some degree of precision. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979); *Soria v. Ozinga Brothers, Inc.*, 704 F.2d 990 (7th Cir.1983). In limited circumstances, a court may project disparate impact from non-statistical data. *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.3d 786 (1977); *Carpenter v. Board of Regents*, 728 F.2d 911, 914 (7th Cir.1984).

If adverse impact can be inferred from plaintiff's data, the employer may present evidence indicating that the challenged practice or rule is a "business necessity." *Griggs v. Duke Power Co., supra.* The practice or rule must bear a manifest relation to the job in question. *Id.*, 401 U.S. at 432, 91 S.Ct. at 851. *See also Solo Cup Co. v. Federal Insurance Co.*, 619 F.2d 1178, 1186 (7th Cir.), *cert. denied* 449 U.S. 1033, 101 S.Ct. 608, 66 L.Ed.2d 495 (1980).

If the employer shows that the challenged procedure is necessary to its business, the plaintiff may show that the rule actually is a pretext for discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). It is at this juncture only that the employer's motive is tested. *New York City Transit Authority v. Beazer, supra.* A plaintiff may demonstrate pretext by showing that other, non-discriminatory, selection criteria would serve the employer's purpose as well. *Carpenter v. Board of Regents, supra.*

The burden of proving discriminatory impact remains with Shidaker throughout the inquiry. Only the burden of going forward is imposed upon the Postal Service if a *prima facie* showing of discriminatory impact is made. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

As a threshold matter, it is arguable whether disparate impact analysis is even proper here where the system attacked includes both objective and subjective parts. The Eighth Circuit addressed the question and holds that "[a] subjective decision-making system cannot *alone* form the foundation for a discriminatory impact case." (emphasis added). *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir.1981). *See also Talley v. United States Postal Service*, 720 F.2d 505, 507 (8th Cir.1983), *cert. denied* 104 S.Ct. 2155, 80 L.Ed.2d 541 (1984). The Seventh Circuit recently noted the issue, but found it unnecessary to resolve. *Soria v. Ozinga Brothers, Inc., supra.*

The use of subjective criteria is not unlawful *per se. See e.g., Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975). The question is do the selection criteria, objective or subjective, impermissibly burden a person in a protected group. Thus discriminatory impact analysis may be applied here, though the procedure which is challenged consists of subjective parts.

The validity of subjective devices increases in direct proportion to the level of employment sought. In cases where the skills sought are minimal or can be objectively quantified, or the position is entry level, courts reject as illegitimate purely subjective evaluations of potential or fitness. *Nanty v. Barrows Co.*, 660 F.2d 1327 (9th Cir.1981); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir.1972).

In contrast, while objective factors may play a threshold role in professional or entry level management positions, decisions as to promotions at these levels likely turn on an evaluation of more intangible subjective qualities, such as leadership skill and ability to take decisive action when necessary. However, even subjective tests for upper level employees and professionals will not withstand scrutiny unless the underlying goals are clear and job-related. *See, e.g., Davis v. Board of School Commissioners*, 600 F.2d 470, 474-75 (5th Cir. 1979) (principal); *Peters v. Lieuallen*, 568 F.Supp. 261, 266 (D.Or.1983) (compliance officers, state department of higher education). *But see Leisner v. New York Telephone Co.*, 358 F.Supp. 359 (S.D.N.Y.1973) (interviews for women in management rejected). *See also Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir.1977) (husband and wife); discriminatory intent cases: *Harris v. Group Health Association, Inc.*, 662 F.2d 869 (D.C.Cir.1981) (doctor); *Frausto v. Legal Aid Society of San Diego, Inc.*, 563 F.2d 1324 (9th Cir.1977) (attorney); *Powell v. Syracuse University*, 580 F.2d 1150 (2d Cir.), *cert. denied* 439 U.S. 984, 99 S.Ct. 570, 58 L.Ed.2d 656 (1978) (professor); *Chalk v. Secretary of Labor*, 565 F.2d 764 (D.C.Cir.1977), *cert. denied* 435 U.S. 945, 98 S.Ct. 1527, 55 L.Ed.2d 542 (1978) (writer/editor).

Although it is appropriate to use disparate impact analysis, Shidaker fails to make out a *prima facie* case of disparate impact. The statistics presented to the Court are as follows: In November, 1974, women held 20.8% of the positions in the Postal Service workforce. The percentage had moved to 23.5% by November, 1980. Nationally, women held 11.5% of the positions at PES-15 and above in January, 1980.

In 1978, the year of Shidaker's failed promotion, women occupied 23 of the 108 postmaster positions in the North Suburban MSC, or 21.2% of the total postmaster

positions. However, none of the women postmasters were rated higher than PES-20 and 15 of them were at level PES-15 or lower. Additionally in 1977-1978 a total of 2,008 women were employed in the North Suburban MSC, 29.4% of the entire Postal Service workforce in the area. Despite that overall percentage, only four women or 5% were rated in positions of PES-19 or higher. Grossly, the disparities could be significant.

However, aside from informing the Court that she was the only female applicant for the three PES-22 postmaster vacancies in 1977, Shidaker presented no other evidence of applicant flow. The Court was not informed of how many women, if any, had applied for X number of vacant postmaster positions, of any level, in the past. Nor does the Court know how many women even were eligible to apply for the 1977 or past vacancies. No breakdown of the number of women in each PES position by year was presented. Without such basic data, the impact of the Postal Service's promotion procedure cannot be fairly tested.

The use of statistics in investigation of management discrimination is complicated by the problem of defining the relevant labor pool. Lower level jobs require skills present or readily acquired by persons in those categories. Such an assumption does not apply to management jobs which demand skills and training possessed by relatively few individuals. Accordingly, the absence of applicant flow data is a serious deficiency in Shidaker's proof. Although expert testimony is not required in every case, no presentation was made to analyze or probe the limited data which were presented.

The paucity of data also prevented the Court from testing for adverse impact by reference to the "Four-Fifths Adverse Impact Rule" utilized by the EEOC. 29 C.F.R. ¶ 1607.4. Under this approach, a selection rate is determined by examining the employer's actual experience in

hiring or promoting, and comparing the percentage of minority applicants with nonminority applicants who are hired. If "[a] selection rate for any race, sex or ethnic group . . . is less than four-fifths (4/5) of the rate for the group with the highest rate," the selection process normally has an adverse impact. *Id.*

Having failed to prove a *prima facie* case of discriminatory impact, it is unnecessary for the Postal Service to prove whether its promotion procedure was a business necessity.

DISPARATE TREATMENT

The Court concludes that Shidaker has made a *prima facie* showing of disparate treatment in accordance with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973):[2]

(1) she belongs to a group protected by Title VII;

(2) she was at least as qualified for promotion as one of the candidates selected;

(3) she was considered but denied promotion; and

(4) the jobs that she sought were filled by men.

Of the three candidates promoted to the positions sought by Shidaker, two of them were more qualified when judged only by objective criteria. Prior to promotion, Boeckenhauer was a PES-21 postmaster in Des Plaines. The Des Plaines Post Office was roughly comparable to any of the three post offices with vacancies. It served a population of 105,000, with 88 regular mail routes and utilized 232 employees. Boeckenhauer had been with the post office for 21 years, four of which were at grade PES-21.

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[2] There is some doubt in this Circuit whether the McDonnell Douglas standards for *prima facie* disparate treatment apply in promotion cases, where the criteria are subjective and the evaluation is comparative. *Mason v. Continental Illinois National Bank*, 704 F.2d 361 (7th Cir.1983).

Daily had 12 years of service, with two years in grade PES-20. He managed the Bloomingdale Post Office, which served a population of 11,500, with six regular routes and 16 employees. Although the difference between Shidaker's qualifications and Daily's is not as dramatic as the difference between those of Shidaker and Boeckenhauer, a marked difference nonetheless exists. While Shidaker had 15 years experience, 13 of which were at PES-18, all her service was at the Kenilworth Post Office, one of the six smallest in the North Suburban MSC. Kenilworth's population is almost four times smaller than Bloomingdale's, and it had one half as many delivery routes. Furthermore, Shidaker was responsible for only six full-time employees, the other four positions authorized were part-time positions.

The Postal Service has demonstrated that Boeckenhauer and Daily were selected for their superior qualifications. In *Holder v. Old Ben Coal Co.*, 618 F.2d 1198, 1201-02 (7th Cir.1980), the Seventh Circuit stated

> [a] desire to hire the more experienced or better qualified applicant is a non-discriminatory, legitimate and common reason on which to base a hiring decision. Thus . . . plaintiff must foreclose this possible explanation for a hiring decision before a *prima facie* case is established.

By inference, the Title VII plaintiff in this Circuit must allege that he or she is as qualifed or more qualified than those persons who received the position sought by the plaintiff. *See also Mason v. Continental Illinois National Bank*, 704 F.2d at 364. ("No rational enterprise that has several qualified candidates for a position selects among them by lot, it picks the best qualified").

Thus if Shidaker is to prevail at all, it must be by demonstrating first that she is as qualified as Soto and second that the Postal Service promoted Soto instead of her for discriminatory reasons. Shidaker and Soto each were

rated as PES-18 postmasters and had been employed by the Postal Service for 15 years. Furthermore, both the Algonquin and Kenilworth Post Offices had only three regular delivery routes. On one level, it appears that Shidaker was more qualified for promotion than Soto. Shidaker served in a PES-18 position for 13 years, while Soto was in that grade for fewer than three years. That "deficiency" in Soto, however, is balanced by the fact that Soto entered the Postal Service as a level four employee and received six promotions before his appointment as postmaster in Algonquin. Shidaker's position as a PES-18 was an entry level position. Another leveling factor is that the Algonquin Post Office serves a population area more than three times the size of the Kenilworth Post Office, thereby exposing its postmaster to a greater degree of financial transactions and experience. Finally, at Algonquin, Soto was in charge of 15 employees including one supervisor and five part-timers. Shidaker's authority extended over ten employees including five part-timers.

Although the case is close, the Court finds that on balance Shidaker and Soto were roughly of equal qualifications.[3] Shidaker has made out a *prima facie* case of disparate treatment. The burden of going forward now shifts to the Postal Service to articulate a legitimate, nondiscriminatory reason for denying the promotions to Shidaker. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green, supra.*

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[3] The Court could have found that Shidaker was not even minimally qualified and, therefore, that no *prima facie* case was proved. The Screening Board established that no candidate with less than 20 points would be recommended. That finding was rejected, however, as the Court considered instead the grosser qualifications of longevity and level of service to constitute minimal qualifications. Soto was not awarded 20 points as a composite score by the Screening Board either.

The Postal Service states that the reason for selecting Soto over Shidaker was that Shidaker was not recommended by the Screening Board. Her composite score for each vacancy was below 20, which was the cutoff score between recommendation and not. Soto's composite score for the Glenview vacancy was 19, and he also was not recommended initially. His name was put forward only after those candidates with higher scores either dropped out or were otherwise eliminated. Soto and one other candidate had the next highest scores of 19. It is irrelevant whether both of the men who earned scores of 19 were then recommended. What is important is that *a* next most qualified candidate was recommended and ultimately selected. The reason that Soto was elevated into the running, *i.e.*, his higher composite score, is a legitimate, nondiscriminatory business reason—if the process used to arrive at that score is valid under the circumstances.

The Postal Service has demonstrated that the persons selected to fill the vacancies were required to have high levels of management skills. Each post office vacancy to be filled, including the Glenview office to which Soto was promoted, was designated "medium size, first class," served populations ranging in size from 35,000 to 70,000, included commercial and industrial firms, had from 29 to 42 regular delivery routes, and was growing. The postmasters chosen would supervise between 89 to 114 employees and be responsible for annual revenue of up to $5.5 million.

To probe the managerial ability of the applicants, a Screening Board, which included one minority member, was appointed and given previously compiled records of each applicant. Those records included both Postal Service and non-Postal Service histories. Of particular relevance was material on each applicant's experience and performance in employee relations, budget operations and planning and scheduling of work. To the historical data

was added an "Estimate of Potential," prepared by the applicant's immediate supervisor. The Estimate rated the applicant on factors such as motivation, personal growth and learning capacity.

The initial scores assigned to each applicant were derived by each screener without consultation with the others, thereby minimizing the possible force of anecdotal influence in the first scoring. Each applicant was separately rated for each vacancy sought. Although the screeners later added their specific, firsthand observations about Shidaker's work style and managerial ability, (and presumably about the other applicants), those observations were pertinent to the skills required for the positions sought.

While most of the material relied upon by the screeners was subjectively derived, the Screening Board made an effort to objectify its decision by applying a point system to the findings, considering each vacancy separately and then by comparing each candidate to the others. Each candidate who was not automatically entitled to be recommended for interview, was required to be evaluated by this same subjective/objective process. The Court finds that the procedure used by the Postal Service to initially select candidates for promotion consideration was permissible and without overt indicia of discrimination.

It remains only to decide whether the Postal Service erred by selecting Soto instead of Shidaker. It did not. There is no obligation under Title VII requiring an employer to integrate its workforce or make gender-preferential promotions where all candidates are equal or minimally qualified. *Texas Department of Community Affairs* v. *Burdine, supra.* "[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Id.* at 259. 101 S.Ct. at 1097. Similarly, outside the factory setting the first qualified applicant need not be selected where

a choice is made " 'on the basis of qualifications, recommendations and subjective impressions.' " *Mason* v. *Continental Illinois National Bank,* 704 F.2d at 365, quoting *Loeb* v. *Textron, Inc.,* 600 F.2d 1003, 1017, n. 18 (1st Cir.1979).

Where, as here, the promotion selection among minimally and arguably equally qualified applicants was made for a legitimate business reason, and no evidence of purposeful discrimination is offered, a plaintiff cannot show that the employer's proffered reasons are pretext. Shidaker cannot rebut by showing that "but for" gender discrimination she would have been selected. *See McCluney* v. *Joseph Schlitz Brewing Co.,* 728 F.2d 924, 928 (7th Cir. 1984); *Sherkow* v. *State of Wisconsin, Department of Public Instruction,* 630 F.2d 498, 502 (7th Cir.1980). Shidaker has not proved, by a preponderance of the evidence, that the Postal Service failed to promote her because she was a woman.

RETALIATORY REDUCTION IN GRADE

The matter of administrative review of Shidaker's reduction in grade was presented to the Court without supporting briefs discussing the evidence or, with one exception, oral argument pointing out in what respect Shidaker claims the hearing officer erred. That exception relates to Shidaker's claim that she did not receive a copy of a letter sent by Santoro to a higher authority after Shidaker's response to the damages for grade reduction. The Court has reviewed the administrative record and the notice of reduction in grade and finds that the decision to reduce is supported by substantial evidence.

The charges in the notice to reduce which were found to be substantial after administrative review were (1) failure to follow management's instructions; (2) failure to timely report status of mail and failure to follow managerial instructions; (3) failure to train an employee to assume re-

sponsibility in Shidaker's absence; (4) falsely accusing an employee of serious misconduct; and (5) failure to take disciplinary actions against an employee despite management's instructions to do so. Shidaker also had been notified that her reduction was due to a failure to file reports of status mail during the Christmas 1981 period and misrepresentation of work hours. However those charges were not sustained.

A review of the relevant evidence in support of the finding for grade reduction is: Shidaker persistently ignored or disobeyed repeated instructions to bring her office into compliance with the Fair Labor Standards Act by correcting numerous time-keeping and pay computation errors involving straight time, overtime and night differential pay for her employees. Ultimately, personnel at the North Suburban MSC had to prepare the necessary corrected forms and send them to Shidaker for her signature. Shidaker's failure to make these corrections cost the Postal Service $356.00.

Despite notice of the MDO program and its efficiency goals, and training and instructional visits by members of the MSC staff, Shidaker failed to bring her post office into compliance with several items of the program: Item 1, requiring the availability of 90% of the mail volume for the letter carriers when they report for work; Item 3, "DUVRS," whish is data used for work hour decisions; Item 4, workload leveling; Item 5, carrier control forms; Item 7, reporting work hours of supervisors and carriers; Item 8, park points—5 or less unless otherwise justified; Item 9, relays; Item 10, office supervision; Item 11, street supervision; Item 12, mobile accountable cart; Item 14, Review PS (Postal Service) forms 4570; Item 15, carrier route books.

Shidaker also failed, despite repeated instructions, to change her starting time to 8:00 a.m. so that she could "assign auxiliary assistance or overtime" for the letter

carriers and make any decisions necessary to expedite the sorting and casing of the mail; to appoint and train an acting supervisor (204B supervisor) who could serve in her absence; and to submit a 16 point MDO check list reflecting the dates by which she proposed to implement the 16 MDO items or the dates on which she had implemented the items.

All postmasters in the North Suburban MSC were instructed to complete the "Daily Condition Report," which is a seven (7) item report concerning the status of mail in their post offices, during the period December 10-24, 1981. They also were instructed to report the information daily by telephone to a designated post office. Shidaker failed to make her report in a timely manner to the Park Ridge Post Office on Saturday, December 12, Monday, December 14, and Thursday, December 17, 1981. When requested to explain this failure, Shidaker's response to one MSC manager was, "Cool it man." When Santoro requested an explanation, Shidaker accused Santoro of being "completely out of line" and of having "very poor judgment."

Shidaker failed to comply with Santoro's July 27, 1981 order that she train an employee to serve as an acting supervisor (204B supervisor) during her absences. She also failed to comply with Santoro's subsequent order of August 5, 1981. On December 16, 1981, almost five (5) months later, Shidaker requested a level 13 supervisor to cover the Kenilworth post office during her forthcoming three weeks of leave.

In a letter to Santoro dated July 28, 1981, Shidaker accused Charles Fargo, a full-time clerk in Kenilworth, of falsifying time cards, falsifying mail volume reports and writing a partially obscene letter during work time. When Postal Inspectors investigated, Shidaker could produce no records or other evidence of such falsifications although such falsifications are felonies under federal law.

Nonetheless, Shidaker told the inspectors that Fargo also had misused a "penalty indicia" Postal Service envelope in connection with the later. When the Postal Inspectors indicated that they would question Fargo, Shidaker then said that her accusations were intended only to oppose Fargo's elevation to the position of acting supervisor, Kenilworth. Although Shidaker was repeatedly instructed to take corrective actions against employee Montoya, who actually wrote the letter and misused the penalty envelope, she refused to do so. Misuse of a penalty envelope is a federal crime.

Shidaker also complains that after she answered charges made against her by Santoro, Santoro responded to his higher authority without sending her a copy of his response to her answer. Any procedural error committed by not sending her a copy of Santoro's response was cured by the fact that the entire administrative record was available to Shidadker when the matter was heard by the appointed hearing officer.

The Court finds that there is substantial evidence in the record to support the finding of the Postal Service that Shidaker was not reduced from Postmaster PES-18 to full-time distribution clerk, PES-5, step 12 in reprisal for filing the April 28, 1978 EEO complaint. The reduction was the result of Shidaker's misconduct and poor work performance, as specified in the proposed notice to reduce her from postmaster to clerk and set forth in the above Findings of Fact. Therefore, the decision to reduce Shidaker in grade was neither arbitrary nor capricious.

IT IS THEREFORE found that

(1) Shidaker has failed to prove sexual discrimination in promotion by either a disparate impact or disparate treatment theory.

(2) There is substantial evidence in the administrative record to support the finding of the Postal Service that Shidaker was demoted in grade for misfeasance and mal-

feasance and not in retaliation for pursuing her civil rights claim.

(3) The Court finds the issues in favor of the Postal Service and against Darlene Shidaker. Accordingly, the complaint is dismissed with prejudice.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-2791

DARLENE SHIDAKER, PLAINTIFF-APPELLANT

v.

WILLIAM BOLGER, IN HIS CAPACITY AS POSTMASTER GENERAL (UNITED STATES POSTAL SERVICE), DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[May 1, 1986]

ORDER

Before: HON. WALTER J. CUMMINGS, *Chief Judge,* HON. WILLIAM J. BAUER, *Circuit Judge,* HON. JOEL M. FLAUM, *Circuit Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by Albert V. Casey, appellee, (now Postmaster General of the United States Postal Service), and all of the judges on the original panel have voted to deny the petition for rehearing and suggestion of rehearing *en banc.* Accordingly.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby DENIED.

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No. 87-1516

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1987

ANTHONY M. FRANK, in his capacity as Postmaster General of the United States Postal Service,

Petitioner,

v.

DARLENE SHIDAKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Darlene Shidaker, the plaintiff below, files this brief in opposition to the petition for writ of certiorari of Anthony M. Frank, Postmaster General of the United States.

PRELIMINARY STATEMENT

The sole issue raised by petitioner for review is whether the respondent has stated a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on disparate impact resulting from a subjective promotion practice or procedure. The petitioner points out that a similar issue is raised in *Watson v. Fort Worth Bank & Trust Co.*, No. 86-6139, and requests that the Court hold its petition in abeyance until the issuance of the decision in *Watson*.

For four reasons, the Court should not hold this case pending *Watson* nor grant the petition for writ of certiorari.

First, the petition requires the Court to review the evidence on the nature of the promotion procedures and to overturn a specific finding of fact on this issue. After receiving the evidence at trial, the district court specifically found that the promotion procedures were in part objective and that the petitioner took steps to objectify the promotion process. The petition asks that this finding be overturned.

Second, contrary to the position he now takes in this Court, petitioner consistently argued to the district court that the promotion procedures and criteria were objective. Petitioner urged the district court to make such a finding. The district court made such a finding, and the petitioner did not assert in its appeal that the finding was clearly erroneous. Thus, if the Court accepts this case for review, it will be required to weigh evidence and reverse findings of fact before ever reaching the legal issue raised by the petitioner. The Court will also be required to grapple with the fact that the petitioner himself asserted a position directly contrary to the one he now argues.

Third, this case is still in an interlocutory stage with an incomplete factual record. The court of appeals in its two prior opinions remanded the case for the taking of further evidence. The court of appeals held only that the

respondent made out a *prima facie* case, and has given the petitioner an opportunity to assert any defense it chooses on remand. If the Court's decision in *Watson* should require a re-examination of this case, the district court, which is most familiar with the evidence, is in the best position to perform this re-examination. If the respondent wins on remand, the petitioner will still have the opportunity to seek review in this Court. If the petitioner wins on remand, a review by the Court may be unnecessary.

Fourth, as a factual matter, the promotion selection devices in this case and in *Watson* are markedly different, and *Watson* can have no application to this case.

STATEMENT OF FACTS

1. Promotion Procedures

Respondent, a Postal Service employee since 1962, had been the postmaster of the Kenilworth, Illinois Post Office since 1964 at a salary level of PES 18. Pretrial Order Statement of Uncontested Facts (A.F.) No. 1. In 1977, she applied for promotion to three postmaster positions at larger post offices in Palatine, Glenview and Franklin Park, each of which commanded a higher PES 22 salary level. A.F. No. 22, App. 17a-18a.

The specific procedures for promotion are contained in the Postal Service *Personnel Handbook*, P-11, TL-4, Pl. Exh. No. 23 at 17; Tr. 54-55, 75, 131-133; *Page v. Bolger*, 645 F. 2d 277 (4th Cir. 1981). A Postmaster Screening Board (the Board) is set up in accordance with these procedures to review applicants for postmaster positions. The Board is composed of four persons, two directors from other Postal Service districts and two postmasters. App. 19a, Pl. Exh. No. 23, Tr. 117-118, 130-133, 319, 375.

The Board, in the first instance, reviews the qualifications of the applicants for promotion. Tr. 54. The Board reviews certain forms and documents relating to the candidates and then scores each applicant. The score of each

individual Board member is added up, and the candidates are then ranked on the basis of total points received. App. 19a-21a.

There were a number of standardized Postal Service forms the Board reviewed. First was the applicant's "Personal History Summary" or Form No. 991, Pl. Exh. No. 23, 33, Tr. 57, which contained the applicant's education background, Postal Service courses taken and employment experience. *Id.*; Tr. 56. Another form reviewed was the "Estimate of Potential," known as Form No. 2577, prepared by the immediate supervisor of the candidate. Part A of the Form No. 2577, entitled "Potential Ability," lists five subject areas to be rated and nine categories of ratings. *Id.*; App. 19a-21a.

Another form is the five page "Analysis of Experience, Background and Potential," Pl. Exh. No. 33, which requires answers with specific data to questions regarding labor relations, equal employment opportunity, decision making, problem solving, budget operations, employee development, supervision of branch operations, planning and scheduling of work, safety and health, customer and community relations, and the amount of unused sick leave. *Id.*

The Board members testifying at trial stated that they relied on extensive statistical data on the operations of the post offices managed by each applicant. The Board considered data on budgets, routes and delivery systems, hours of work of employees, time for deliveries, equipment used and other services of the post offices of applicants. Tr. 65-73, 107-112, 136-140, Jt. Exh. 24, Pl. Exh. No. 12, 23, Def. Exh. No. 1-5, 94-95.

Each Board member, after reviewing these forms, gave a grade to each candidate. The scoring system was as follows:

Outstanding candidate:	8-7
Very good candidate:	6-5
Acceptable candidate:	4-3

The scores of each member were then totalled and all those who received a score of 20 and above were referred for further review by the Regional Management Selection Board, which then made a recommendation to the Postmaster General. App. 21a. This process was standardized for all promotions. A standardized report was prepared by the panel stating the results, ranking of candidates, and the reasons for rejection of those not referred further. Jt. Exh. 3-7; 9-12; 14-17, 19-20, 26; Def. Exh. No. 7- 12; 96-98.

Respondent scored less than 20 and was thus eliminated from further consideration. For the Glenview position, respondent ranked 13 out of 32; for Palatine, respondent ranked 16 out of 32 applicants; for Franklin Park, she ranked 15 out of 28. App. 21a-22a.

The petitioner has a policy of promoting from within, rather than hiring for higher level positions, and experience and training within the Postal Service are keys to promotion. App. 19a; Tr. 49-53. Since there are no special qualifications for higher level postmaster positions, the primary basis for determining the relative qualifications of a candidate was his or her experience as a postmaster in a larger post office or in the Officer in Charge (OIC) program. The OIC program offered postmasters direct training for higher level postmaster work. Jt. Exh. No. 7, 14, 17; Def. Exh. No. 7-12, 96-98. Pl. Exh. No. 23 at 6, 14-20, Tr. 338-342, 348-9, 70, 305-08, 294-95, 297, 400.

Female employees were underrepresented in receiving OIC experience. For the year prior to the promotions in issue, less than 10% of OIC assignments were held by women, even though they held 21% of the postmaster positions. Pl. Exh. No. 23 at 14-18; Def. Exh. No. 104.

2. Petitioner's Contentions in the District Court

Although the petitioner in this Court characterizes the promotion procedures just described as "subjective," this was not his argument in the trial court. Quite the contrary, at virtually every stage of the trial, petitioner argued that the promotion procedures were, in fact, objective. In his opening statement, counsel asserted that the three forms and other materials used by the Board were objective and essentially statistical. Tr. 21-25, 28-30. At a later stage in the trial, counsel argued that the forms were objective and based on "measurable objective data," and the evaluation by the panel itself was "objective." Tr. 171-75. In closing argument, counsel repeated that the promotion procedures "were in fact objective and demonstrated to be so," Tr. 418, 427, and that the materials used were "not subjective." Tr. 174-76.

The district court, in holding that these promotion procedures may be considered under a disparate impact test, found that they had "both objective and subjective parts," App. at 35a, but that "[w]hile most of the material relied upon by the screeners was subjectively derived, the Screening Board made an effort to objectify its decision." App. at 42a. Petitioner did not challenge any of these findings on appeal. Because these findings were not in issue on appeal, the court of appeals did not reach the question of the applicability of disparate impact analysis to subjective decision making.

3. Statistics

At trial, respondent presented statistics demonstrating that the promotion procedures restricted females in the North Suburban MSC (the area covering the Northern District of Illinois) and nationally to PES 18 level and below. In the North Suburban MSC, women held 21% of the postmaster positions, yet none was rated over a PES 20, and more than 65% of the female postmasters were PES 15 and

below. Only 5% of those postmasters over PES 19 were female, even though women held 29% of the total positions in the North Suburban MSC. While men comprised approximately 70% of the work force, 95% of those over PES 19 were male. App. 24a.

Nationally, female underrepresentation in the upper level PES positions mirrored that in the North Suburban MSC. Although females comprised approximately 21% of the national workforce, they held only 11.5% of the PES 15 and above positions. App. 24a. Men were eight times more likely than women to be promoted to PES 19 positions and above. Pl. Exh. No. 23 at 13.

A report circulated to petitioner's employees by the Postmaster General of the United States stated that "white males had . . . three times greater success than women" in attaining high level positions. The report detailed underrepresentation of females in all of the upper level positions of the Postal Service, and concluded that there was serious discrimination against women. Pl. Exh. No. 48 at 2.

The Postal Service presented no other statistics on the promotions or PES levels of females, nor any other evidence seeking to explain or to refute the statistics which the respondent presented. In answers to interrogatories after remand, petitioner admitted that because "men tended to be found in proportionately greater numbers in supervisory and managerial positions than women . . . they would gain the experience necessary for advancement to higher-level positions in proportionately greater numbers than women." Resp. to Interrogatories 3 *et seq.* at 2.

4. Procedural History of the Case

The district court, after trial, held that respondent failed to prove a *prima facie* case of disparate impact because of the absence of applicant flow statistics. In its first decision on respondent's appeal, the court of appeals reversed the judgment for petitioner, holding that

the statistics had made out a *prima facie* case of disparate impact. The court remanded for further evidence and stated that the petitioner could raise any number of defenses to respondent's *prima facie* case. Petition at App. 22a-23a.

In his first petition for writ of certiorari, the petitioner raised the same issue he raises now: whether subjective decision making is subject to a disparate impact analysis. The petitioner also raised the issue whether the underrepresentation statistics presented by the respondent were sufficient to establish a *prima facie* case of disparate impact.

This Court granted the petitioner's first petition, vacated the court of appeals' decision and remanded for further consideration in light of *Johnson v. Transportation Agency*, 107 S.Ct. 1442 (1987), which discussed the second issue, *i.e.*, underrepresentation statistics.

On remand, the court of appeals re-adopted its prior decision, held that the respondent's statistics presented a *prima facie* case of disparate impact and remanded the case to the district court for further consideration..

The Postmaster General again seeks to have this case held in abeyance while yet another decision, *Watson v. Fort Worth Bank & Trust Co.*, is considered.

REASONS FOR DENYING THE PETITION

1. The Petition Requires the Court to Review Evidence and the Findings of the District Court.

Certiorari should be denied when the issue presented for review turns on an analysis of specific evidence and will require the Court to review findings of fact by the district court. This Court has stated that "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *see, Texas v. Mead*, 465 U.S. 1041 (1984) (Opinion of Justice

Stevens). In the instant case, the petitioner asks the Court not only to review specific findings of fact, but to reverse findings which were not even challenged in the court of appeals.

Although the petitioner urges the Court to decide whether a disparate impact analysis applies to subjective decision making, the record contains substantial evidence that the promotion procedures were, in fact, objective. This was the position asserted by the petitioner himself in the trial court. The district court, as a result, found that the procedures were in part objective and that the Board sought to objectify its decision-making. The petitioner did not appeal this finding in the court of appeals.

The record amply demonstrates that the promotion procedures and the criteria considered by Board members were, in fact, objective. The four member all-male panel, some of whom were not personally acquainted with candidates, reviewed standardized forms. Those forms contained scores for certain performance categories and statistical data on the candidates and the operations of the post offices managed by them. After review of that data, Board members individually applied a scoring system of 3 through 8. The candidates were then ranked on the basis of the total scores, and a cut-off score of 20 was made.

Each Board member who testified stated that the most important basis for his grade was the objective criteria relating to the prior experience and training of the candidate. A candidate was rated higher if he or she had experience managing a large post office or had OIC experience. Because female postmasters were at lower PES levels and were not given a sufficient number of OIC training assignments, they did not have as much managerial experience as male postmasters. Petitioner admitted that the failure of females to receive these managerial assignments caused their disproportionately low success rate in promotions to higher level PES postmaster positions.

The premise underlying petitioner's claim for certiorari is that the procedures challenged by the respondent were subjective. Neither the evidentiary record nor the district court's findings of fact supports this premise. Thus, the issue presented by petitioner would require this Court to review the record and reverse findings of fact before reaching the legal issue presented by the petitioner.

2. Petitioner's Present Assertion That the Promotion Procedures Were Subjective Contradicts His Position in the District Court.

Although the petitioner now bases his petition on the contention that the evaluation procedures were subjective, he consistently asserted in the district court that the procedures were objective and urged the court to so find. After the district court entered the requested findings, the petitioner did not claim in the court of appeals that such findings were clearly erroneous. Petitioner should not now be permitted to argue a position directly contrary to the one he asserted below. Counsel for petitioner argued at great length in the trial court that the forms and the procedures of the Board were objective and that the promotion decisions were based in large part on statistics and measurable objective data. In closing, the petitioner argued that the promotion procedures were "in fact objective and demonstrated to be so." Tr. 418. Each witness produced by the petitioner testified that his decision was entirely objective and based on objective data, including the extent of the candidate's experience in managing larger post offices or in prior OIC experience.

Petitioner should not be permitted at this point to change his position and create a fictional legal issue for this Court to consider.

3. The Petition Seeks Review of an Interlocutory Order.

This Court has stated that certiorari should not be granted until a final decree is issued unless it is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & R., Co.*, 148 U.S. 372, 384 (1893). Lack of finality may "of itself" furnish "sufficient ground for denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Firemen v. Bangor & Aroonstock R. Co.*, 389 U.S. 327, 328 (1967).

The court of appeals has remanded this case for further evidence and findings by the district court and has not precluded the petitioner from presenting any defense it might have to respondent's *prima facie* case.

It is possible that the petitioner will yet win this case. Certainly, after further trial, the record will be more developed on factual issues that the petitioner requests this Court to consider now. The petitioner has not demonstrated there will be any extraordinary inconvenience, embarrassment or dire consequences if this Court defers review of this case until the record is further developed and a final judgment is entered. At this interlocutory stage, the case is not ripe for this Court's review.

4. Watson v. Fort Worth Bank & Trust Co. Has No Similarity To This Case.

The facts in this case are not at all similar to those in *Watson v. Fort Worth Bank & Trust Co.* In *Watson*, an individual supervisor, without any criteria or scoring system, simply chose the person he liked best.

Here, the promotion procedures were highly structured. There was a four member board selected on the basis of objective criteria. The Board completed a number of standardized forms which evaluated the candidates in at least 15 specific areas of performance. Members of the

Board relied on statistical data on the operations of the post offices supervised by the candidates in reaching their final grades. A standardized numerical scoring system was used, and a uniform cut-off score was applied. Each of the candidates was ranked on the basis of his/her scores. None of these objective features was present in *Watson*. Unlike the handful of candidates considered in *Watson*, there were approximately 30 candidates for each of the three postmaster positions here. Thus, it is unlikely that *Watson* would have any application to this case.

Even if *Watson* should be considered, however, given the interlocutory nature of the case, there is no reason why the district judge, to whom the case has been remanded and who is most familiar with the evidence presented, should not be the first one to consider these issues.

CONCLUSION

Respondent respectfully requests the Court to deny the petition for a writ of certiorari.

Respectfully Submitted,

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